

Jet Holding Ltd and Others v Cooper Cameron (Singapore) Pte Ltd and Another and Other
Appeals
[2006] SGCA 20

Case Number : CA 96/2005, 122/2005, 97/2005, 129/2005, 98/2005, 128/2005
Decision Date : 29 June 2006
Tribunal/Court : Court of Appeal
Coram : Lai Siu Chiu J; Andrew Phang Boon Leong JA; Tan Lee Meng J
Counsel Name(s) : K Shanmugam SC (Allen & Gledhill), Randhir Ram Chandra and Nicole Tan (Haridass Ho & Partners) for Jet Holding Limited, Jet Shipping Limited, Jet Drilling (S) Pte Ltd and Maurel Et Prom; Gurbani Prem Kumar and Bernard Yee (Gurbani & Co) for Cooper Cameron (Singapore) Pte Ltd; Alvin Yeo Khim Hai SC, Chan Hock Keng and Jaclyn Neo (Wong Partnership) for Stork Technology Services Asia Pte Ltd
Parties : Jet Holding Ltd; Jet Shipping Limited; Jet Drilling (S) Pte Ltd; Maurel Et Prom — Cooper Cameron (Singapore) Pte Ltd; Stork Technology Services Asia Pte Ltd (Formerly Known As Eastburn Stork Pte Ltd)

Contract – Contractual terms – Implied terms – First defendant subcontracting refurbishment of vessel's slip joint to second defendant – Whether contract subject to term implied in law that first defendant to take reasonable care in dealings with second defendant – Whether first defendant breaching any such term

Contract – Remedies – Damages – First defendant subcontracting refurbishment of vessel's slip joint to second defendant – First defendant claiming indemnity from second defendant for breach of contract – Whether first defendant's own breach of implied term in contract precluding first defendant from claiming damages for second defendant's breach – Whether doctrine of contributory negligence applicable to defendants' concurrent breaches of contract

Evidence – Admissibility of evidence – Hearsay – Plaintiffs omitting to call makers of documents tendered in evidence – Whether exceptions to hearsay established – Sections 32, 35 Evidence Act (Cap 97, 1997 Rev Ed)

Evidence – Principles – Necessity for best evidence – Plaintiffs failing to produce originals of documents tendered in evidence – Plaintiffs exhibiting documents in question in witness's affidavit – Whether parties agreeing that authenticity of documents not in issue – Whether documents exhibited to affidavit automatically admitted into evidence – Sections 66, 67 Evidence Act (Cap 97, 1997 Rev Ed)

29 June 2006

Judgment reserved.

Andrew Phang Boon Leong JA (delivering the judgment of the court):

Introduction

1 The present proceedings comprise a total of six related appeals. The number of appeals is due to the fact that there are three main parties as well as the fact that there are appeals against the trial judge's orders as to costs. However, that having been said, the basic facts are common to all these appeals and are (more importantly) relatively straightforward as well. It would in fact be appropriate at this juncture to set out, in as succinct a manner as possible, the factual matrix, legal issues in the High Court, as well as the learned trial judge's decision. We will then proceed to set out the issues that arise in the present appeals before, of course, dealing with them accordingly.

2 Indeed, it ought to be noted that counsel for the parties in the present appeal focused on only a few of the more significant issues. This is not surprising as the learned trial judge ("the Judge") dealt with the various issues raised at first instance in an extremely comprehensive fashion (see, especially, *Jet Holding Ltd v Cooper Cameron (Singapore) Pte Ltd* [2005] 4 SLR 417, which is the main judgment, and *Jet Holding Ltd v Cooper Cameron (Singapore) Pte Ltd* [2006] SGHC 20, which deals solely with the issue of costs). In fact, and as we shall elaborate upon below, the comprehensiveness just mentioned is accompanied by ample clarity as well as legal justification with regard to virtually all the legal issues raised. To this end, therefore, we will focus, in the main, on those issues which counsel for the parties themselves focused upon during the present appeals. To be sure, we will also cover the remaining issues but will not seek to re-traverse ground already well-covered by the Judge.

3 The factual matrix is, as already mentioned, a relatively straightforward one, as follows.

4 The present proceedings arise out of the two decisions referred to at [2] above, and which we shall hereafter refer to as "the original action" (with the judgments at [2005] 4 SLR 417 and [2006] SGHC 20 being referred to as "GD" and "the costs judgment", respectively). The original action involved three main interest groups: the four plaintiffs, the first defendant ("Cameron") and the second defendant ("Stork"). Each group has appealed against both of the Judge's decisions, leading to the total of six appeals mentioned at the outset of this judgment.

5 The dispute arose from the fracture of a slip joint ("the Failed Slip Joint") on board an oil-rig, the *Energy Searcher* ("the Vessel"), on or about 16 March 2001. Slip joints (also known as telescoping joints) form part of a vessel's drilling equipment, and are used to accommodate changes in distance between the drill ship and the seabed caused by tides or ship movement. The upper end of the slip joint is connected to the vessel in question by a riser box, which is a critical load-bearing component in the drilling unit. In the present case, the Failed Slip Joint had an RCK-type riser box ("the Riser Box"). On the relevant date, in the course of being installed on the Vessel, the Failed Slip Joint fractured at the end connector of the Riser Box, about 19 inches from the box face. As a result of this, the components of the drilling unit attached to the lower half of the Riser Box dropped to the bottom of the ocean. A large part of the equipment still remains unfound. Subsequent investigation revealed that the wall of the Riser Box had been over-machined, leading to excessive thinness and inability to support the weight of the drilling unit.

6 In response to these events, the plaintiffs commenced the original action against both defendants. The four plaintiffs were as follows: (a) Jet Holding Ltd ("JHL"), the owner of the Vessel on the relevant date; (b) Jet Shipping Ltd ("JSL"), the former owner of the Vessel and the bareboat charterer of the Vessel on the relevant date; (c) Jet Drilling (S) Pte Ltd ("JDL"), the manager of the Vessel; and (d) Maurel Et Prom ("MEP"), the alleged assignee of the respective rights, title and interest of the other three plaintiffs.

7 Prior to the events in question, there were originally two slip joints on the Vessel, which were respectively given the subsea numbers 501 and 502. Upon finding that both joints were unfit for use, JDL contracted with Cameron on behalf of JSL, the owner of the Vessel at that time, to refurbish and repair them. The works were then subcontracted to Van Der Horst Engineering Services Pte Ltd ("VDH"). Using selected components from both joints, VDH re-assembled a single operational joint. This refurbished joint was given the subsea number 502 and was used as the primary slip joint on board the Vessel ("the Primary Slip Joint"). Cameron then subcontracted the refurbishment of the unused parts of the two original joints to Stork ("the refurbishment contract"). Stork was told to create a new slip joint ("the Standby Slip Joint"). VDH then sent the discarded parts to Stork, which then used the parts to fabricate the Standby Slip Joint. This joint was allocated the subsea number 503.

8 In the original action, the plaintiffs alleged that the Failed Slip Joint was one and the same as the Standby Slip Joint and sought, *inter alia*, damages for breach of contract against Cameron and damages for negligent breach of duty against both Cameron and Stork. Cameron denied all liability, and additionally commenced third party proceedings against Stork for any damages it might be ordered to pay. The plaintiffs initially alleged that the Standby Slip Joint had remained on board the Vessel from 1998, the time it was refurbished by Stork, until it fractured on the relevant date in 2001. However, Cameron subsequently adduced documents indicating that the Standby Slip Joint had been onshore in Malaysia sometime in 1999. In the face of these documents, the plaintiffs conceded during their closing submissions that the Standby Slip Joint had indeed been in Malaysia, allegedly for storage purposes.

9 At the conclusion of the trial of the original action, the Judge found that the Failed Slip Joint was indeed the Standby Slip Joint that the defendants had refurbished: see GD at [42]. She held that Cameron was guilty of breaching its contract with JSL, and that both the defendants had breached their duty of care to JHL and JSL by failing to detect and remedy the defect in the Standby Slip Joint: see GD at [110] and [130]. As regards JDL and MEP, the Judge held that they had no *locus standi* to bring the claims in either tort or contract, and were therefore not entitled to any damages: see GD at [52] and [69].

10 One of Stork's tasks as part of the refurbishment job was to dismantle and inspect the discarded parts received from VDH ("the pre-inspection").[\[note: 1\]](#) The Judge held that Stork had acted negligently by failing to *detect and remedy* the non-conforming "step" in the Riser Box either during the pre-inspection, in the course of refurbishment or before the Riser Box left its premises: see GD at [131]. The evidence at trial showed that Rajamanickam Prabhuram ("Prabhuram"), Stork's quality control inspector at the relevant time, had "chosen to act in a way in which a reasonable man would not act": see GD at [130]. According to Prabhuram, although he knew that a dimensional inspection was required from Stork's quotation No QT2279-GA.R1 dated 25 August 1998 ("the Quotation")[\[note: 2\]](#) to Cameron, he did not think it a standard or common practice to conduct wall thickness tests on the Riser Box: see GD at [88].

11 During the trial, Stork placed great reliance upon the fact that Cameron failed to furnish Stork with the relevant dimensional drawings: see GD at [98]. According to Stork, this made it impossible for Stork to ascertain the existence of any dimensional defects in the Riser Box wall. The Judge held that these omissions on Cameron's part did not detract from Stork's liability for breaching its duty of care to JHL and JSL: see GD at [130]. In the absence of the dimensional drawings, Stork should not have gone ahead with the pre-inspection: see GD at [130].

12 On the issue of causation, the Judge rejected Cameron's allegation that the failure by JHL and JSL to maintain and inspect the Standby Slip Joint amounted to a *novus actus interveniens*: see GD at [127]. She also found the defence of contributory negligence inapplicable. Due to the separate and independent nature of Cameron's and Stork's breach of duty, the Judge held that they were concurrent tortfeasors and therefore *severally* liable to JHL and JSL for the *full* extent of their loss: see GD at [164]. As the defendants were additionally found to be equally culpable, the Judge ordered Stork to indemnify Cameron for 50% of the total damages. We pause here to observe that the word "indemnify" is used in a *broad* sense. This is an important point to which we shall have occasion to return (see below at [119]–[123]).

13 Having found the defendants liable to JHL and JSL, a crucial factor that affected the award of damages was whether the documents proving loss were properly admitted into evidence. The bulk of these documents had been discovered via the plaintiffs' second and third supplemental lists of documents; some were also contained in the (first) list of documents. These documents, which

allegedly proved the quantum of the plaintiffs' loss, were subsequently consolidated into 12 volumes ("the Damages Bundle") for the purposes of the trial. The other documents which did not relate to the question of damages were compiled in the plaintiffs' bundle of documents.

14 The documents in the supplemental lists were used as evidence of the plaintiffs' loss arising from the defendants' breach of duty, and were adduced at trial via the Damages Bundle. In addition, almost all these documents relating to quantum of damages were also referred to in Helmut van Roijen's affidavit.[\[note: 3\]](#) Helmut van Roijen ("HR") was the operations manager in charge of the Vessel and a key witness for the plaintiffs. As the plaintiffs had initially omitted to exhibit any of the documents referred to in HR's affidavit, they were granted leave by the Judge to rectify this defect by adducing a supplemental affidavit of evidence-in-chief ("SAEIC") to introduce the relevant documents.[\[note: 4\]](#)

15 The Judge found that the documents in the Damages Bundle had not been properly admitted in evidence because the plaintiffs failed on at least two counts: (a) to adduce primary evidence of the documents or prove that the exceptions for adducing secondary evidence applied; and (b) to prove the truth of the contents of these documents through admissible evidence that was not hearsay: see GD at [146] and [149]. Accordingly, she refused to consider any part of the Damages Bundle when assessing the extent of loss caused by Cameron's breaches. As a result, the Judge found that the JSL and JHL had not proved their claims other than for the lost Blow Out Preventor ("BOP") stack, and consequently, awarded them nominal damages for those other alleged losses. The plaintiffs were awarded damages in the amount of US\$1m for the loss of the BOP stack, and the further sum of \$10 as nominal damages in respect of the other pleaded heads of damage. This was a far cry from the composite sum of US\$22m (approximately) that the plaintiffs claimed[\[note: 5\]](#) for heads of damage such as the value of lost or damaged equipment, the loss of future income, costs of hiring and refurbishing substitute equipment and costs of the settlement agreement that had to be made with Cairn Energy India Pty Limited, who had hired the Vessel under a time charter.

16 Looked at in the round, there were two broad categories of legal issues which arose for decision by the Judge in so far as the *substantive* issues were concerned. The first related to the issue of liability and the second related to the requisite remedies (principally, the quantum of damages that ought to be awarded), assuming that liability had been established. The focus of the present appeal has been on the *latter* as opposed to the former. Further, the specific focus in so far as the latter (*viz*, the sphere of remedies) is concerned has been largely *evidential* in nature.

17 We should, however, mention that there is, in *addition to* the issues relating to the quantum of damages as outlined briefly in the preceding paragraph, one particular aspect of *liability* that is of particular importance, but which was *not*, apparently at least, canvassed *sufficiently* by all the counsel concerned at first instance. The focus before the trial court was on the alleged liability of *Cameron and Stork to the plaintiffs*. However, what seemed to us of greater significance in so far as the *present proceedings* were concerned was, instead, the issue of liability *between Cameron and Stork*.

18 Given the focus at trial, it is not surprising, therefore, that the Judge appeared to decide this particular issue on the basis of Cameron's and Stork's *tortious* liability *vis-à-vis* the plaintiffs *only*, and did not seem to additionally make any determination on whether their respective liabilities to the plaintiffs had been caused by breaches of duty or contract between them *inter se* for which an indemnity could be sought. In the event, as already mentioned, the Judge held that, as both Cameron and Stork were found to be equally culpable for the damage caused to the plaintiffs, Cameron was entitled to a declaration that Stork was to indemnify Cameron to the extent of Stork's share of the damage (caused to the plaintiffs) assessed at 50%. The important issue that arises in this regard and

which was not (as we have alluded to above) canvassed adequately by counsel concerned at first instance was the situation of liability in *contract* as between Cameron and Stork. This issue is especially significant in the light of the fact that, under present Singapore law, the allocation of liability between the parties in the context of contributory negligence can (as we shall see) only take place where there is *concurrent liability in contract and tort* (here, between Cameron and Stork). This requires, in turn, an analysis of what the precise situation between Cameron and Stork was in the present proceedings and, in particular, the precise nature of the terms (both express and implied) of the contract that they had entered into. Although the learned trial judge did advert to this particular issue very briefly, this was in the context of the issue of liability with respect to the plaintiffs instead (see GD at [119]–[121]).

19 We turn now to consider (in turn) the two specific points of focus set out above. To recapitulate, the first centres on the issue of *remedies* – in particular, in relation to primarily *evidential* points. The second pertains to the ascertainment of the precise legal relationship (and, hence, allocation of liability) between Cameron and Stork. After considering these two main points of focus, we will then proceed to deal briefly with the rest of the issues, most of which were not pressed to any great extent by the various counsel concerned in the present appeal.

The quantum of damages and the Damages Bundle

Introduction

20 Not surprisingly, counsel for the plaintiffs in this appeal, Mr K Shanmugam SC, focused on the Damages Bundle. It was crucial inasmuch as it (as we have already mentioned) contained a very detailed rendition of the alleged damage caused to the plaintiffs. Without it, the plaintiffs' victory in so far as the issue of liability was concerned was almost a Pyrrhic one. We say "almost" because the Judge did in fact award the plaintiffs US\$1m for the loss of the BOP stack and \$10 nominal damages for the other heads of damage that had been pleaded. But this was a far cry from the plaintiffs' total claim, which was in the region of some US\$22m.

21 We begin with the simple – yet time-honoured – legal proposition that a plaintiff can only be awarded damages if such damages have been *proved*. To put it another way, the mere proof of liability on the part of the defendant is only one of the pre-requisites. Absent the proof just mentioned, the plaintiff would be awarded only nominal damages in vindication of its legal rights.

22 The proof, in so far as the plaintiffs in the present proceedings are concerned, was contained in the Damages Bundle. The Judge, as we have noted, held that the documents contained in this bundle ("the Documents") had not been properly admitted into evidence. Without these documents, the plaintiffs' claim was, in effect, emasculated. In order to persuade this court that the Documents ought to be admitted, counsel for the plaintiffs rested his argument on two main planks. The plaintiffs would succeed on the issue of authenticity if they were successful on either plank.

23 The first main plank rested on an exchange which took place before the Judge. In essence, counsel for the plaintiffs argued that this exchange evidenced an agreement by the parties to the effect that the authenticity of the Documents would not be an issue. Put another way, the plaintiffs' argument was that the defendants had waived any objections to the authenticity of the Documents. The only legal issue was that of the truth of the contents and centred, in this regard, on the question of hearsay. The plaintiff's *written submissions* also refer to a series of *correspondence* between the parties which are *also* alleged to evince an agreement to like effect – a point which we will in fact deal with first (at [27] below). Mr Shanmugam further raised a closely related argument which, however, was phrased at a much broader level. He argued that, in any event, it was unconscionable

for the defendants to raise any objections to the authenticity of the Documents and that such objections constituted an abuse of the process of the court; in the premises, he argued that the defendants ought to be estopped from raising such objections.

24 The other main plank relied upon by Mr Shanmugam was that since HR filed his SAEIC together with the attached documents, the authenticity of these documents was no longer in issue; only the truth or veracity of the documents remained to be determined.

25 It is apposite to note, at this juncture, that even if the plaintiffs succeeded in the present appeal on the issue relating to the authenticity of the Documents, they had to surmount one further legal hurdle. Indeed, this particular hurdle has already been mentioned above but bears repeating. The plaintiffs had also to prove, to the satisfaction of the present court, that the contents of the Documents were true. In particular, they had to surmount the objection stemming from the rule against hearsay.

26 We turn, now, to consider each of the main planks relied upon by counsel for the plaintiffs with regard to the issue of the authenticity of the Documents before proceeding to consider the objection stemming from the rule against hearsay.

The plaintiffs' first argument

27 The first main plank derives, firstly (and examining the situation from the perspective of dealing with documentary evidence), from a series of correspondence between the lawyers for the plaintiffs on the one hand and the lawyers for Cameron and Stork on the other. [\[note: 6\]](#) On close examination of this correspondence, however, we are unable to find that there had been an agreement as such between the parties that the Documents would be admitted into evidence. On the contrary, there is nothing in this series of correspondence which suggests that counsel for the defendants had in fact resiled from, or compromised in any way, the *objections* that they had taken during the trial itself and which we refer to in more detail below (at [68]–[71]). In their written submissions, the plaintiffs do refer to the facsimile from *their own* lawyers dated 5 November 2004 to the defendants' lawyers. [\[note: 7\]](#) However, the *plaintiffs'* own understanding of the situation does *not necessarily* translate into an agreement on the part of all the parties concerned – especially when we take into account their obvious self-interest in the matter. It is true that the facsimile from counsel for Stork dated 6 November 2004 [\[note: 8\]](#) might lend some ostensible support to the plaintiffs' arguments in this regard. However, this last-mentioned response is not, in our view, unambiguous and, in any event, there does not appear to be a similar response from counsel for Cameron.

28 The first main plank of the plaintiffs' argument also derives from the following exchange during the second day of the trial which, because of its obvious importance, is set out in full as follows: [\[note: 9\]](#)

Mr Tan [Counsel for Stork]: I have no further questions.

Her Honour: Re-examination?

Mr Chandra [Counsel for the plaintiffs]: Your Honour, just one point. Under *order 27, rule 4*, the "Admission and production of documents specified in list of documents", specifically in rule 4 it says:

"Subject to paragraph (2) and without prejudice to the right of a party to object to the

admission in evidence of any document, a party on whom a list of documents is served in pursuance of any provision of order 24 or any order made thereunder shall, unless the court otherwise orders, be deemed to admit --

(a) that any document described in the list as an original document ...

(b) that any document described herein as a copy is a true copy."

So the authenticity question insofar as I have no objections, therefore I will now, if my learned friend says he challenges that authenticity, which they have never said --

Her Honour: He has lost the right by now to do that.

Mr Chandra: Yes, he has lost his right. He is making a separate point.

Her Honour: He is making a separate point.

Mr Chandra: He is making a point really on -- I need to know the parameters here of interpretation or authenticity.

Her Honour: What he really means *if* he has given up the right *under order 27, rule 4*, you don't have to bring the maker.

Mr Chandra: Yes, I don't have to bring the maker.

Her Honour: But you still need to prove the document in the sense that you have to bring somebody who knows of the document so that they can cross-examine the person on the document.

Mr Chandra: Very well.

Her Honour: So somebody who was involved and can give some personal knowledge is really somebody who you should bring.

Mr Chandra: Very well, Your Honour. In that case, may I have five minutes to confer with my clients before I just resume the re-examination of the witness on those issues that he is able to speak of directly, because there are some issues that he can, clearly on the operational aspect, there are some issues that he can't clearly as he said he wasn't involved in it. So I just want to segregate those two points, speak to my instructing solicitors on this matter and then commence re-examination, if I could have --

Her Honour: All right, we will take a five-minute recess.

Mr Chandra: Until quarter to 4, Your Honour?

Her Honour: Yes.

[emphasis added]

29 With respect, however, the exchange set out above ought not be read in isolation. In other words, it must be read in the *context* of the proceedings as a whole. We would observe that if this particular argument by the plaintiffs is to succeed, there must be clear evidence of an agreement by

the parties concerned to the effect that the authenticity of the documents in question was not an issue. We do not see this arising at all from the exchange set out above. Indeed, the Judge appears to have nevertheless alluded to the fact that authenticity was still an issue. In any event, the focus appeared to be on O 27 r 4 of the Rules of Court (Cap 322, R 5, 2004 Rev Ed), which we find is not ultimately relevant in the context of the present proceedings (see [73] below). On the whole, in fact, this particular exchange appears to be rather ambiguous, at best.

30 On the contrary, what clinches the case, so to speak, against the plaintiffs in so far as this particular argument is concerned is the fact that we find *the precise opposite* occurring in the form of *clear objections taken by the defendants and which were noted by the Judge herself* (see generally below at [72]). Further, in so far as the exchange last quoted was concerned, this took place on the *same day* of trial as the *objections* taken by the defendants.

31 Counsel for the plaintiffs also briefly relied, as noted above, on a broader argument that had its source in the concept of fairness in general and the doctrine of estoppel in particular. In this regard, he relied on the Australian High Court decision of *The Commonwealth of Australia v Verwayen* (1990) 170 CLR 394.

32 The doctrine of estoppel, like all legal doctrines, must be proved. It is not even clear that counsel for the plaintiffs was utilising the doctrine proper although he was certainly relying on the *spirit* underlying it – which is to prevent unconscionable conduct. This much is, in our view, clear from his reference to an alleged abuse of the process of court by the defendants. With respect, however, the argument was run too vaguely and altogether too briefly. As for the argument from fairness, this is dealt with when we consider a similar argument in a related context below (at [40]–[65]).

33 Most importantly, however, is the fact that *the Judge herself* made a clear finding to the effect that the parties had *not* entered into the agreement so strenuously argued for by Mr Shanmugam. As she put it, “[t]here was also *no agreement* to dispense with formal proof of the claims for damages” [emphasis added] (GD at [145]). Indeed, as we shall see below, the Judge actually held *the precise opposite* – that the defendants had, instead, *objected to* the introduction of the Documents (see [68]–[71] below). Mr Shanmugam, however, sought to argue that the Judge had somehow been mistaken and had missed what in his view was the crucial exchange set out above. In the first instance, we have found that that exchange did not support the argument that there had indeed been an agreement between the parties with regard to the introduction of the Documents. More to the point, it is highly unlikely, in our view, that the Judge could have overlooked this very crucial point, dealing with a very crucial part of the case. Mr Shanmugam argued that this was possible in the light of the length of the proceedings. We are of the view that the length of the proceedings as well as the volume of documents are not material considerations in this regard. A trial judge is present throughout the proceedings and is fully cognisant of all that has transpired. More importantly, the trial judge constantly sifts the substantive legal wheat from the irrelevant legal as well as extra-legal chaff and notes the former down accordingly. Indeed, it is *precisely* because this issue was a crucial one that all the relevant facts that had led the Judge to the conclusion she arrived at must have been of *especial significance* to her *in the midst of* the lengthy proceedings themselves. She would have in fact been the *best* person to assess whether or not the defendants had objected to the Documents simply because she was, as we have mentioned, present throughout the proceedings. In the circumstances, the plaintiffs’ argument on this particular issue must fail.

The plaintiffs’ second argument

34 The second main plank of the plaintiffs’ case with respect to the issue of the authenticity of the Documents centred on the Malaysian Federal Court decision of *Palaniappa Chettiar v Tan Jan*

[1965] 1 MLJ 182 ("*Palaniappa Chettiar*"). In that case, Thomson LP held that a document which was exhibited to an affidavit of evidence-in-chief ("AEIC") should be treated as though it were copied out in the affidavit itself. Counsel for the plaintiffs therefore argued that, in the present proceedings, the Documents were admitted into evidence when the SAEIC was filed in court and tendered through its deponent.

35 This argument was attractive at first blush. However, on closer scrutiny, we found that it could not apply to the present proceedings and, in particular, that *Palaniappa Chettiar* was not in fact applicable in the context of the present case. Let us elaborate.

36 What *Palaniappa Chettiar* decided was that where the deponent of an AEIC signed the affidavit concerned, he or she was also deemed to have signed the documents exhibited to it as well. In other words, the *contents* of the AEIC would be deemed to *include* the *contents* of the documents exhibited to it as well. *However*, the crucial issue before this court was *quite different*; it concerned the issue as to whether or not *the actual documents themselves were admitted into evidence together with the affidavit itself*. If, in fact, documents such as those involved in the present appeal were *automatically* admitted into evidence by virtue of the fact that they were exhibited to the affidavit concerned *without more*, this would, in our view, *enable parties to circumvent the relevant rules and principles embodied within the Evidence Act (Cap 97, 1997 Rev Ed) which are intended to ensure that only the best evidence is admitted into evidence*. Indeed, such an argument, if accepted, would, with respect, make a *mockery* of the rules and principles in the Evidence Act. In an extreme situation, *wholly bogus documents* could be admitted simply because the deponent of the affidavit had exhibited them to the affidavit itself. To be sure, the documents concerned would constitute part of his AEIC, but *whether or not such documents could be admitted into evidence as authentic documents would depend on whether or not they satisfied the requisite criteria contained in the Evidence Act or fell within the relevant exceptions contained therein*. To take another (and less extreme) situation, if the plaintiffs' argument is accepted, then the deponent of the affidavit could exhibit *any manner* of document. In such a situation, is the court to *assume* that such documents have satisfied the legal requirements under the Evidence Act? Is not the other party (the defendants in the present proceedings) legally entitled to object to the authenticity of the Documents and require that they be admitted *in accordance with the proper rules of evidence*? After all, do not the rules and principles of evidence (particularly as embodied within the Evidence Act) serve a *purpose* (indeed, an *important* purpose)? These rules and principles are not, in other words, mere window-dressing. Indeed, it would be appropriate at this juncture to set out briefly the rationale of the relevant rules and principles themselves in order to demonstrate how important a role they play in the administration of justice.

37 The relevant provisions are ss 63 to 67 of the Evidence Act, although the focus in the present proceedings will be on ss 66 and 67. The provisions themselves (without the accompanying Explanation(s) and/or Illustration(s)) read as follows:

Proof of contents of documents

63. The contents of documents may be proved by primary or by secondary evidence.

Primary evidence

64. Primary evidence means the document itself produced for the inspection of the court.

Secondary evidence

65. Secondary evidence means and includes —

- (a) certified copies given under the provisions hereinafter contained;
- (b) copies made from the original by electronic, electrochemical, chemical, magnetic, mechanical, optical, telematic or other technical processes, which in themselves ensure the accuracy of the copy, and copies compared with such copies;
- (c) copies made from or compared with the original;
- (d) counterparts of documents as against the parties who did not execute them;
- (e) oral accounts of the contents of a document given by some person who has himself seen it.

Proof of documents by primary evidence

66 . Documents must be proved by primary evidence except in the cases mentioned in section 67.

Cases in which secondary evidence relating to documents may be given

67.—(1) Secondary evidence may be given of the existence, condition or contents of a document admissible in evidence in the following cases:

- (a) when the original is shown or appears to be in the possession or power of —
 - (i) the person against whom the document is sought to be proved;
 - (ii) any person out of reach of or not subject to the process of the court; or
 - (iii) any person legally bound to produce it,

and when, after the notice mentioned in section 68, such person does not produce it;

- (b) when the existence, condition or contents of the original have been proved to be admitted in writing by the person against whom it is proved or by his representative in interest;
- (c) when the original has been destroyed or lost, or when the party offering evidence of its contents cannot for any other reason not arising from his own default or neglect produce it in reasonable time;
- (d) when the original is of such a nature as not to be easily movable;
- (e) when the original is a public document within the meaning of section 76;
- (f) when the original is a document of which a certified copy is permitted by this Act or by any other law in force for the time being in Singapore to be given in evidence;
- (g) when the originals consist of numerous accounts or other documents which cannot conveniently be examined in court, and the fact to be proved is the general result of the

whole collection.

- (2) In cases (a), (c) and (d), any secondary evidence of the contents of the document is admissible.
- (3) In case (b), the written admission is admissible.
- (4) In case (e) or (f), a certified copy of the document but no other kind of secondary evidence is admissible.
- (5) In case (g), evidence may be given as to the general result of the documents by any person who has examined them and who is skilled in the examination of such documents.

38 The provisions set out above (in particular, s 66) have, as their core rationale, the aim of ensuring that the *best evidence* is available before the court (see GD at [146] as well as *Sarkar's Law of Evidence* (Wadhwa and Company, 15th Ed, 1999) vol 1 ("*Sarkar*") at pp 1059, 1073, 1078–1079 and *Sir John Woodroffe & Syed Amir Ali's Law of Evidence* (Butterworths, 17th Ed, 2001) vol II ("*Woodroffe & Amir Ali*") at pp 2849–2850 and 2884). That is why the general rule (again, in s 66) is that all documents must be proved by primary evidence, with "primary evidence" being defined (in s 64) as meaning "*the document itself* produced for the inspection of the court" [emphasis added]. Section 66 does, however, expressly provide for an exception where *secondary* evidence might be given *in the circumstances set out in s 67*. Applying these straightforward principles to the present appeal, it is clear, first, that the requirements in s 66 have not been satisfied. At *no* stage in the proceedings before the Judge were the *original documents* produced. Secondly, it is equally clear that the requirements in s 67 were not satisfied either.

39 At this juncture, because Mr Shanmugam did make some passing reference to the parol evidence rule as embodied within ss 93 and 94 of the Evidence Act, we need to observe (also in passing) that this last-mentioned set of provisions must be *distinguished from* those presently considered (*viz*, ss 63–67 of the Evidence Act). It is true that there could be some overlap or even coincidence where the evidence concerned falls within the purview of ss 93 and 94. However, absent such a *factual* coincidence, these last-mentioned provisions do in fact serve quite different purposes (and see, for example, *Sarkar* at p 1074). As a leading textbook also puts it (see *Woodroffe & Amir Ali* at pp 2886–2887):

The provisions [*sic*] of s 64 [of the Indian Evidence Act, which is the equivalent of s 66 of the Singapore Evidence Act] must be distinguished from those of s 91 [of the Indian Evidence Act, which is the equivalent of s 93 of the Singapore Evidence Act]. The latter deals with matters which the parties have put in writing or which the law requires to be in writing. In such cases, except where secondary evidence may be given, the document is an exclusive record of that which it embodies. The parties are not at liberty to resort to other evidence.

All that the present section [*viz*, s 64 of the Indian Evidence Act] says is that if it is desired to prove the contents of a document, the document itself must, save in certain exceptional cases, be produced. But, if a writing does not fall within either of the classes already described, no reason exists, why it should exclude oral evidence.

Of impracticality, unfairness and balance

40 Counsel for the plaintiffs sought – indirectly, at least – to suggest that it was both impractical as well as unfair to expect the plaintiffs to satisfy the above-mentioned provisions,

especially since the number of documents was voluminous. However, such arguments from practicality and fairness must have a legal basis. In fact, the legal basis that is relevant to the present proceedings appear to point in the *opposite* direction in so far as the plaintiffs are concerned. As we have seen, the relevant provisions of the Evidence Act (in particular, ss 66 and 67 thereof) indicate that the plaintiffs have not in fact satisfied the requisite legal requirements from an evidential perspective. Indeed, in so far as the concept of fairness is concerned, the whole rationale underlying these various provisions is to ensure that fairness results to *both* parties, including (here) *the defendants*.

41 We note, however, that our Evidence Act was promulgated in its original form over one hundred years ago. The quantity and quality of documents has, unsurprisingly, increased as well as changed in the interim. Hence, the arguments that counsel for the plaintiffs have raised in so far as practicality and fairness are concerned cannot be dismissed out of hand. They embody the classic tensions that often run through most areas of the law. One is the tension between efficiency and fairness. However, the two are not incompatible. In fact, the former is itself one conception of fairness. Further, fairness is, as we have alluded to in the preceding paragraph, a concept that ought to result to both parties.

42 Another tension is to give effect both to the original intention underlying the statutory provisions concerned as well as to the changed circumstances which were not (in the nature of things) envisaged or contemplated at the time those provisions were enacted. It is true that it is often the case that both are irreconcilable. One issue that arises is whether or not this is the situation here. If so, then this court must leave any reform to the Singapore parliament itself.

43 Put simply in the context of the present proceedings, the tension appears to be as follows: How should the court give effect to the underlying rationale of (in particular) ss 66 and 67 of the Evidence Act on the one hand, as well as ensure, on the other hand, that by giving effect to this rationale, inefficiency and unfairness do not ensue as a result? This latter consideration – not, perhaps, present at the time the Evidence Act was *originally* introduced in the local context – should not, in our view, be ignored because to do so would be tantamount to ignoring the practical realities in a changed (and ever-changing) legal milieu.

44 By way of preliminary observation, although it is true that a copious number of documents were involved in the present proceedings, it is equally true that any problems of authenticity could have been surmounted (as they often are in cases of this nature) by an agreed bundle of documents, although (unfortunately) this was not the case here. However, it must be emphasised that whilst formal proof of the documents concerned is dispensed with by an agreed bundle of documents, the *truth* of their contents will still have to be proved in the absence of any agreement or admission to the contrary. In this regard, the observations in the Singapore High Court decision of *Goh Ya Tian v Tan Song Gou* [1980–1981] SLR 578 at 581, [12] are too broad inasmuch as they suggest that the proof of the truth of the contents of the documents concerned is also dispensed with and, to that extent, ought not to be followed.

45 Indeed, when counsel for Stork, Mr Alvin Yeo SC, was posed a question as to practicality when so many documents were involved, he referred precisely to the solution in the form of an agreed bundle of documents; where there was no such agreed bundle, which situation he conceded was the right of any party in litigation to insist upon, Mr Yeo argued that parties (again, pursuant to their respective rights in litigation) had the prerogative of objecting to any documents tendered – with any sanctions lying in the sphere of an order for costs. As we explain below, we are of the view that this last-mentioned point is (subject to the issue of timing) generally correct. If the parties cannot come to the more felicitous arrangement where there is in fact an agreed bundle, then each must face the

consequences of a potentially “messier” situation in so far as the admission of documents into evidence is concerned. Unfortunately, this was precisely the situation here – but with a slight (albeit vitally significant) difference. The defendants were within their legal rights to object to the Documents tendered by the plaintiffs. But we did not perceive counsel for the plaintiffs to be arguing that the Damages Bundle should have been admitted on the basis that no objections had in fact been taken by the defendants in the instant case to it. As we have seen, counsel for the plaintiffs relied, instead, on the argument to the effect that the defendants had in fact agreed to admit the Damages Bundle, which was a somewhat different argument and indeed imposed, in our view, a heavier onus of proof on the plaintiffs and which we did not accept.

46 The plaintiffs were therefore under at least a *prima facie* legal duty to comply with the requirements of the relevant provisions under the Evidence Act. They did not. The relevant statutory provisions are there for a purpose. However, as we have already pointed out above, an insistence – without more – on a strict compliance with these provisions might lead to undesirable practical consequences. Is there a *balanced* approach that enables the objectives of such provisions to be achieved without deleterious practical effects?

47 In our view, a balanced approach might entail the following principles. However, because we were *not* (unfortunately, in our view) addressed *fully* on them (*cf*, especially, [66] below), they are proffered only by way of preliminary observations only. More importantly, any *definitive* approach adopted would have *wide-ranging implications* in an extremely important area of legal practice; hence, there is a need for a more considered hearing before a definitive approach is laid down by this court. It is therefore hoped that this court will hear fuller arguments in a future decision. Nevertheless, we do not feel that, the point having been necessarily raised as an integral part of the present proceedings, we can simply ignore it. However, we would also like to emphasise the fact that *even if* the principles we are about to set out by way of an exploratory analysis, so to speak, are in fact applicable (and hence applied) to the present case, it would make *no difference* to the result we have arrived at – as will be evident from our analysis below (at [67]–[73]). Given the fact that the difficulties centring on the application of the relevant provisions of the Evidence Act were in effect raised by the parties in the present case, we feel that our (albeit preliminary) views not only provide a point of departure for a future decision of this court but also (if we may be permitted this musical analogy) constitute (in part at least) a closing bar of sorts to what would otherwise have been an awkward and jarring pause in a movement initiated (but unfinished) by the parties themselves. We now turn, therefore, briefly to these views.

48 Firstly, we must begin with the general principle that the party who wishes to introduce the documents concerned into evidence must comply with the salient provisions of the Evidence Act (and see, for example, the Indian Privy Council decision of *Krishna Kishori Chowdhurani v Kishori Lal Roy* (1887) 14 IA 71). To begin with, any other premise would ignore the clear provisions of the Act. Worse still, it would be a signal to parties to be indisciplined in so far as the introduction of documents is concerned. It would then be the thin end of the procedural wedge and might even lead to the fraudulent introduction of documents. The fact that there is another legal barrier in the form of testing the truth of the contents of documents is no excuse for lowering the barrier in relation to the authenticity of documents under the salient provisions of the Evidence Act, and which would itself constitute an important threshold safeguard.

49 Secondly, however, it is also important to ensure that – at the other extreme – parties who wish (in *good faith*) to introduce documents to support their case are not put through an unnecessary procedural treadmill. An extreme example would be a situation where a party has to rely upon thousands of documents to establish his or her case in complex litigation.

50 There is also a broader policy reason why an overly punctilious insistence on compliance with the provisions in the Evidence Act for its own sake is undesirable. If it is the case that a party is placed with the positive burden of producing original documents or calling the maker of the documents sought to be introduced into evidence, this would entail (particularly in situations akin to that outlined in the preceding paragraph) an enormous waste of court time and resources in the event that the party seeking to introduce the documents concerned is seeking to do so in good faith. That being said, it is of course open to the opposing party to *object* to the admission of the documents concerned and insist that the other party produce the original documents or the maker of the documents concerned. That is his or her prerogative. But what if such an objection is frivolous or vexatious? It is our view that if it can be demonstrated that this is in fact the case, then sanctions can be imposed by way of an order for *costs*.

51 We are therefore of the view that whilst, as an important point of departure, a party seeking to introduce documents into evidence ought to comply with the provisions in the Evidence Act, if these documents are in fact marked and admitted into evidence without that party in fact satisfying the requirements in the Evidence Act *and* where there has been *no objection taken by the other party at that particular point in time*, then that other party *cannot* object to the admission of the said documents later. This last-mentioned proposition applies, of course, in an *a fortiori* manner when the party who had not objected to the introduction of the documents subsequently *cross-examines* the relevant witnesses on these documents in an attempt to discredit the truth of the contents stated therein. We note that whilst this particular argument was in fact raised in the plaintiffs' *written submissions*, they were *not* the *direct* focus during oral argument before this court. This particular argument was addressed *indirectly* inasmuch as counsel for the plaintiffs emphasised (as we have noted above) the argument from both impracticality and unfairness. However, if at all, this would have constituted the *legal basis* for the much more general argument just referred to. As a result, however, this particular point was not really (let alone effectively) addressed by all counsel concerned. More importantly, the extremely important issue as to how a *balance* was to be achieved in the light of the presence of the relevant provisions of the Evidence Act was not addressed by counsel for the parties. This was indeed the much more important (and broader) legal canvas of which this point from objecting to the introduction of documents into evidence (although an important point) is only a part.

52 We pause here to note that the approach suggested in the preceding paragraph relating to the fact as well as time of objecting to the introduction of documents is in fact supported by an extremely lengthy line of Indian case law. Bearing in mind the fact that the Singapore Evidence Act (as already noted) had its roots in the Indian Evidence Act, these authorities are of no inconsiderable persuasive value if they are otherwise consistent with general logic, principle as well as justice and fairness, and are not inconsistent with the socio-economic mores of Singapore itself. As just noted, the number of Indian decisions is enormous (and see generally *Sarkar* at pp 1076 and 1084 as well as *Woodroffe & Amir Ali* at pp 2855, 2860–2861, 2876, 2900–2901 and 2902), and we can but touch on some illustrative cases only. Significantly, none of these foremost textbooks on the law of evidence avoids the analysis of the equivalent of ss 63–67 of the Evidence Act; on the contrary, the discussion and analysis in these works is both scholarly and perceptive *and* includes the discussion of this point *without any sense of contradiction at all* (see generally *Sarkar* at ch V and *Woodroffe & Amir Ali* at ch 5). This supports the approach adopted here to the effect that a *balance* can (and ought to be) struck between upholding the rationale and integrity of ss 63–67 of the Evidence Act on the one hand and achieving a practical and workable result on the other. Suffice it to state that these cases just mentioned have one basic theme that is embodied within the following words by Sir George Rankin, delivering the judgment of the Board in the Indian Privy Council decision of *Gopal Das v Sri Thakurji* AIR 1943 Privy Council 83, as follows (at 87):

Where the objection to be taken is not that the document is in itself inadmissible but that the mode of proof put forward is irregular or insufficient it is essential that the objection should be taken at the trial before the document is marked as an exhibit and admitted to the record. A party cannot lie by until the case comes before a Court of appeal and then complain for the first time of the mode of proof. A strictly formal proof might or might not have been forthcoming had it been insisted on at the trial. In the present instance, it does not appear that the objection was taken at the proper time or that it would have been of any avail had it been taken.

53 Although the concepts of primary and secondary evidence as embodied within the provisions of the Evidence Act are of fundamental importance, the principle of *waiver* might apply if no objection is raised at the point in time when the evidence concerned is adduced: see, for example, *A V S Perumal v Vadivelu Asari* AIR 1986 Mad 341 at [5]; *Rama Chandra Majhi v Hambai Majhi* 65 (1988) CLT 586 at 593; *The Land Acquisition Officer, Vijayawada Thermal Station v Nutalapati Venkata Rao* AIR 1991 AP 31 at [19]; as well as *Woodroffe & Amir Ali* at pp 2904–2905. On the other hand, a failure to object could simply be construed as *an admission* that the requirements under the Evidence Act were complied with: see, for example, *State of Rajasthan v Jeo Raj* AIR 1990 Raj 90 at [7].

54 Reference may also be made, for example, to the Indian Supreme Court decisions of *Haji Mohammad Ekramul Haq v The State of West Bengal* AIR 1959 SC 488 and *P C Purushothama Reddiar v S Perumal* AIR 1972 SC 608; the more recent Indian state decision of *S A Quddus v S Veerappa* AIR 1994 Kant 20; as well as (closer to home, so to speak) the Privy Council decision on appeal from the Court of Appeal of the Federated Malay States of *Bhagat Ram v Khetu Ram* AIR 1929 Privy Council 110.

55 There has, however, been some suggestion that whilst the concept of objecting is relevant, the document concerned must also satisfy the criteria laid down for secondary documents under s 65 of the Evidence Act (see, for example, *Kalyan Singh v Smt Chhoti* AIR 1973 Raj 263, especially at [15]). The difficulty with such an approach is, however, that by its very terms, s 65 does *not* appear to limit secondary documents *solely* to the categories listed therein.

56 We believe the approach we have outlined above would best achieve the balance required between ensuring that the best evidence is before the court without simultaneously burdening the party seeking to introduce the documents concerned *unnecessarily*. It would also ensure that the court's and the parties' valuable time is not wasted. The other party is of course free to object to the introduction of such documents at any time before the said documents are actually marked and admitted into evidence. If the objections are in fact effected frivolously or vexatiously, there can (as already mentioned) be sanctions imposed – principally in the form of an appropriate order as to costs. We would, however, strongly urge parties to have recourse – as far as is possible – to an agreed bundle of documents, leaving out only those significant documents that are the subject of dispute and ensuring that they are clearly objected to, at which time they will need to satisfy the relevant criteria laid down in the Evidence Act.

57 We pause here to observe, parenthetically, that given the fact that the relevant provisions in the Evidence Act (especially ss 63–67) had been enacted over a century ago, there might be some justification for further legislative refinement. In this regard, we observe that the “best evidence rule” has been eroded even in other jurisdictions over the intervening years. In particular, and this is particularly germane having regard to what we have just stated at the outset of this paragraph, one major issue that arises is whether or not this particular rule has kept pace, as it were, with changes in context. As was aptly put by the authors of a leading Canadian textbook on the law of evidence, “the rules of evidence should reflect the practices of modern society” (see John Sopinka, Sidney N Lederman & Alan W Bryant, *The Law of Evidence in Canada* (Butterworths, 1992) at p 940). More

specifically, in another leading (here, English) textbook, it is observed thus of the “best evidence rule” (see *Phipson on Evidence* (Sweet & Maxwell, 16th Ed, 2005) at para 7-39):

About the beginning of the nineteenth century, however, a notable reaction set in; and from that date forward, ... the decisions of the courts show a *persistent rescission from the “best evidence” principle*. [emphasis added]

Further, this particular work concludes thus (at para 7-45):

Thus, it would appear that the best evidence rule has, *in civil cases at least*, been *consigned to the history books*. [emphasis added]

58 The *modern* approach towards the “best evidence rule”, is in fact encapsulated within the following words of Balcombe LJ in the English Court of Appeal decision in *Ventouris v Mountain (No 2)* [1992] 1 WLR 887 at 899:

The modern tendency in civil proceedings is to admit all relevant evidence, and the judge should be trusted to give only proper weight to evidence which is not the best evidence ...

59 In a similar vein, in an earlier decision of the English Divisional Court in *Kajala v Noble* (1982) 75 Cr App R 149, Ackner LJ (as he then was) observed thus (at 152):

The old rule, that a party must produce the best evidence that the nature of the case will allow, and that any less good evidence is to be excluded, has gone by the board long ago. The *only remaining instance* of it is that, if an original document is available in one’s hands, one must produce it; that one cannot give secondary evidence by producing a copy. Nowadays we *do not confine* ourselves to the best evidence. *We admit all relevant evidence. The goodness or badness of it goes only to weight, and not to admissibility*: *Garton v. Hunter* [1969] 1 All E.R. 451, *per* Lord Denning M.R. at 453e; see also *Archbold, Criminal Pleading, Evidence and Practice* (40th ed.), para. 1001. [emphasis added]

6 0 However, even “the only remaining instance” referred to in the quotation in the preceding paragraph was “diluted” in the English Divisional Court decision of *Regina v Governor of Pentonville Prison, Ex parte Osman* [1990] 1 WLR 277, where Lloyd LJ, delivering the judgment of the court, observed thus (at 308):

What is meant by a party having a document available in his hands? We would say that it means that a party who has the original of the document with him in court, or could have it in court without any difficulty. In such a case, if he refuses to produce the original and can give no reasonable explanation, the court would infer the worst. The copy should be excluded. If, in taking that view, we are cutting down still further what remains of the best evidence rule, we are content. On the facts, the magistrate was entitled to hold that the prosecution had given a reasonable explanation for the absence of such originals as they failed to produce.

It is also significant, in our view, that the learned lord justice did (on a more general level) in fact re-emphasise the emaciation of the “best evidence rule” a little earlier on in his judgment (at 308), as follows:

[T]his court would be more than happy to say goodbye to the best evidence rule. We accept that it served an important purpose in the days of parchment and quill pens. But since the invention of carbon paper and, still more, the photocopier and the telefacsimile machine, that

purpose has largely gone.

61 The situation appears, in fact, to have been taken a stage further, with “the only remaining instance” referred to at [59] above being recently *rejected* by Jonathan Parker LJ in the English Court of Appeal decision of *Springsteen v Masquerade Music Ltd* [2001] EMLR 25 (with whom Laws and Waller LJ agreed); in the learned judge’s words (at [80]):

For my part, I would not even recognise the continuing existence of that “remaining instance” of the application of “the old rule”. In my judgment, the “obligation” of a party who has a document to produce the original in evidence is founded not on any rule of law but is simply a reflection of the fact that a party to whom a document is available will by reason of that very fact be unable to account to the satisfaction of the court for his non-production of it when inviting the court to admit secondary evidence of its contents, with the practical consequence that the court will attach no weight to the secondary evidence.

62 And, in a more general vein, the Jonathan Parker LJ observed thus (at [85]):

In my judgment, the time has now come when it can be said with confidence that the best evidence rule, long on its deathbed, has finally expired. In every case where a party seeks to adduce secondary evidence of the contents of a document, it is a matter for the court to decide, in the light of all the circumstances of the case, what (if any) weight to attach to that evidence. Where the party seeking to adduce the secondary evidence could readily produce the document, it may be expected that (absent some special circumstances) the court will decline to admit the secondary evidence on the ground that it is worthless. At the other extreme, where the party seeking to adduce the secondary evidence genuinely cannot produce the document, it may be expected that (absent some special circumstances) the court will admit the secondary evidence and attach such weight to it as it considers appropriate in all the circumstances. In cases falling between those two extremes, it is for the court to make a judgment as to whether in all the circumstances any weight should be attached to the secondary evidence. Thus, the “admissibility” of secondary evidence of the contents of documents is, in my judgment, entirely dependent upon whether or not any weight is to be attached to that evidence. And whether or not any weight is to be attached to such secondary evidence is a matter for the court to decide, taking into account all the circumstances of the particular case.

Once again, we find the modern approach reiterated to the effect that, generally speaking, all evidence will be admitted, with the focus being on the *weight* to be accorded to the evidence concerned instead.

63 In so far as the more specific issue of *photocopied or xeroxed documents* is concerned, there are a number of Canadian decisions which are useful inasmuch as they demonstrate a *contrast* in approach. In the Provincial Court (Judicial District of Peel, Ontario) decision of *Regina v Lutz* (1978) 44 CCC (2d) 143, Langdon Prov Ct J adopted a very pragmatic approach towards such documents that (in our view) is consistent with the modern context, as follows (at 150):

In 1978 the fact and reliability of the photostatic copying machine is a matter of such common experience that it needs no *person* to vouch for it. For example, voluminous authorities cited by counsel in argument on the issues in this case were handed to the Court in the form of obvious photostatic copies in the cases in questions [*sic*]. Counsel, I am sure, would be justifiably offended if I had requested an affidavit of comparison or notarial certificate before reading the documents submitted to the Court. The practice is one of obvious convenience and courtesy on the part of counsel for which the Court is grateful.

That is not to say that a photostatic copying machine is foolproof or cannot be tampered with or cannot be so manipulated that it produces something other than a true copy, perhaps even indeed under appropriate circumstances, a false copy.

But surely, these are matters that go to the weight to be attributed to a photostatic copy, not to its admissibility.

[emphasis in original]

64 In contrast, however, Dryer J, in the British Columbia Supreme Court decision of *Rogers v Hill* (1972) 29 DLR (3d) 628, required that a photocopy of a crucial document had to comply with the usual requirements stemming from the “best evidence rule”.

65 We find, with respect, the approach adopted in *Regina v Lutz* to be more persuasive. It is also consistent with the modern approach that has already been set out in some detail above. We nevertheless reiterate that if the relevant provisions of the Evidence Act need to be amended to take into account an approach that is more consistent with the present context and societal mores, this will need to be effected by the Singapore parliament. We have set out the important changes in both law as well as legal principles in other jurisdictions only to highlight the obvious point that we must never lapse into “legal complacency” and that, as far as is possible, the law will need to move with the times.

6 6 *However*, and returning to the possible approach we have suggested above, we must reiterate, at this juncture, the crucial point that we were *not* addressed *fully* on this approach as well as the principles associated therewith. This being the case, we will leave it to a later decision of this court, which has in fact been addressed fully, to lay down a definitive and conclusive approach. In the meantime, however, we trust that parties will try their level best to arrive at agreed bundles of documents. If that is not possible, then we would strongly urge *both* parties to pay close attention to (especially) ss 63–67 of the Evidence Act *as well as to* objections that might be taken to the introduction of specific documents themselves.

67 Nevertheless, as we have already pointed out above, *even if* the above principles were *applied* to the facts of the present case, we would affirm the Judge’s decision on this particular issue. To begin with, we have found that there had *not* been an agreement between the plaintiffs and the defendants that the Damages Bundle be admitted into evidence. However, in accordance with the principles which we have set out above, this is not the end of the matter. The issue then arises as to whether or not the defendants had *objected* to the introduction of the Damages Bundle into evidence. At this juncture, we should point out that what constitutes an objection depends on precisely what transpired in point of fact. More importantly, as the trial judge is in the best position to determine the issue, his or her views will necessarily carry great weight with this court; indeed, on many occasions, they may even be conclusive of the issue.

68 Having closely perused the notes of evidence, we find that the defendants *had* indeed objected to the admission of the Documents. It is true that they did not object to specific documents but it must be borne in mind that the Damages Bundle constituted 12 volumes of documents. However, it is clear that counsel for the defendants were certainly unhappy with the introduction of these documents. We will not canvass each and every occasion which constituted an objection. However, the following exchanges are both instructive and illustrative. It is highly significant, in our view, that these exchanges occurred very early on (*viz, the second day of the trial*) – the *very same day* on which the exchange relied upon by the *plaintiffs* took place (see [28] above). *Indeed, these exchanges will, as we shall see, demonstrate that the defendants were clearly objecting to all the*

plaintiffs' documents. This is, of course, the *very antithesis* of an agreement that the Documents be admitted – a point which, as we have seen, counsel for the plaintiffs was arguing vigorously for.

69 Turning to the first exchange, this is what transpired: [\[note: 10\]](#)

Mr Gurbani [Counsel for Cameron]: Can I show you a letter. Earlier on I put in a document, Your Honour. I don't know whether it should be marked.

Her Honour: Which document?

Mr Gurbani: The management agreement.

Her Honour: Mr Chandra has given us the reference.

Mr Gurbani: *Yes, but the only problem with that is -- I don't know, maybe to be sticky or proper, I am not sure, I have not agreed to any of the documents in the plaintiff's bundle. That is why I am choosing to put them in piecemeal. I would rather that these be marked and then both of us can rely on the documents. As Your Honour pleases.*

Mr Tan [Counsel for Stork]: I have similar difficulties in cross-examination. The approach that my learned friend is taking will also be the approach that I will be taking.

Her Honour: It will cause some problems. It will cause some problems because Mr Chandra must know which documents to lead evidence on to introduce in these proceedings.

Mr Gurbani: These are documents that are theirs. But there are obviously some documents in the plaintiff's bundle, very few of them, which I would like to put to the witness. *The rest of the documents have not been agreed to by any of the defendants. If the documents are going to be referred to as part of the plaintiff's bundle, the difficulty I have with that, and Mr Tan has that same difficulty, is that these documents have not been put into evidence as such.*

Her Honour: Yes.

Mr Gurbani: As far as these documents I am referring to, I am quite happy for them to be put into evidence. That is why I am saying they should be marked, Your Honour.

Her Honour: *So for the management agreement you are happy --*

Mr Gurbani: Happy to put into evidence. That is why I say maybe it should be marked.

Her Honour: Why don't you produce a core bundle insofar as those documents are concerned?

Mr Chandra [Counsel for the plaintiffs]: Your Honour, as I say, when I started with the core bundle I did ask my learned friends what they would like to include. They were not sure.

Mr Gurbani: *There is an avalanche of documents.* I have not been able to go through all the witness statements so far as to produce a core bundle. But as I am examining each witness, the documents that I think I would like to put to the witness I have thought maybe Your Honour could mark them. That is the only suggestion that I have.

Her Honour: You mark them as the plaintiffs bundle? It is already marked as far as the plaintiff's documents are concerned.

Mr Gurbani: *The problem is the plaintiff's documents are the plaintiff's; just like our documents, they are our documents, but they are not in evidence as such. They are still --*

Her Honour: All right. Let me suggest this: for those documents from the plaintiff's bundle, you are going to cross-examine the witness, you are agreeable to them being admitted, call them the AB documents.

Mr Gurbani: Yes, already.

Mr Chandra: Very well, Your Honour.

Mr Gurbani: And we will produce something for Your Honour later on.

Her Honour: Yes, but as we go along we should mark them now. So the only document that you referred to --

Mr Gurbani: So far I think I have only put in the management agreement.

Her Honour: Mr Chandra, do you want to mark them?

Mr Chandra: Yes, Your Honour.

Her Honour: Exhibit AB1.

Mr Chandra: Yes, Your Honour.

Her Honour: For the record it is the management agreement that is marked as exhibit AB1.

Mr Chandra: Very well, Your Honour. I will keep tab of the AB documents.

[emphasis added]

70 Turning, now, to the second exchange, this is what transpired:[\[note: 11\]](#)

Mr Tan: I think my learned friend is prompting the witness, my Lady, but I will take the witness back to clause 2.4.

Her Honour: It is re-examination but there is no need to tell everything.

Mr Chandra: Your Honour, these are legal submissions, Your Honour. It would be fit for my learned friend to put them in submissions because the document on the face of it speaks for itself.

Her Honour: The document may be in trouble as well, might it not? There is nobody to prove the document, and why Mr Tan is asking questions about the document that this man says he cannot prove I do not know, if it is his case.

Mr Gurbani: As far as the first defendant is concerned, I am not taking this particular point, because it is quite obvious from the assignment --

Her Honour: Which point? The last point?

Mr Gurbani: Yes.

Her Honour: What about the proving of the document.

Mr Gurbani: The proving of the document, I didn't put it in. That is why I never put in the deed of assignment at all.

Her Honour: So as far as your client is concerned, you are happy to accept the existence of the assignment.

Mr Gurbani: No. I didn't put these questions to the witness at all. I never put in the document either. So Mr Tan has got me into a bit of a quandary when he puts in the thing as AB. It is not AB as far as I am concerned. Just to be clear, it *is* not AB as far as the first defendant is concerned. Whatever point Mr Tan wants to take, he can take. He is at liberty to take, whether assignment covers or does not cover. For me that document is not in evidence. That is all.

Mr Chandra: I have to make one small point here. Every time a list of documents was filed, not one of my learned friends has objected to authenticity at all. I have not received any. If I have, I must have overlooked it. *Nobody has challenged the authenticity under the admission order. So I am where I am, and they must take it because they have not challenged that.*

Mr Gurbani: *What authenticity? This is the law of evidence. We all know that. We have been practising for so long. As far as we are concerned, if we don't agree that the document is -- we don't agree that the document need not be proven in the usual way, then it has to be proven the usual way. That is all there is to it. No one asked us otherwise.* But as far as I say, whatever documents I have put in as AB, I have no problems with that. *But whatever I have not put in, they can prove in the usual way. I have no problems with that either.* So I am not sure what Mr Tan is getting at, but the only point I want to make as far as 4, 5 and 6 is concerned is not 4, 5 and 6AB, or agreed bundle as far as the first defendant is concerned.

Her Honour: Yes, Mr Tan.

Mr Tan: Your Honour, I think this point may well be something that will replay itself in different fashions, because there may be a situation in which Mr Chandra and I will have an agreement that we are prepared to agree and Mr Gurbani may disagree. So it is not the situation in which. I want to put my learned friend in a difficult position. But invariably there will be documents, Your Honour.

Her Honour: So what is your position on all these three documents?

Mr Tan: I take the point up, Your Honour, primarily --

Her Honour: You are challenging the assignment?

Mr Tan: Yes, I am challenging the assignment.

Her Honour: The legal effect of the assignment, of the documents?

Mr Tan: Yes.

Her Honour: But you are not challenging the authenticity of these documents?

Mr Tan: Mr Perret is not in a position to prove these documents either.

Her Honour: Yes, so what position do you want to take? If he is not in a position to prove the document and nobody is coming to court to prove these documents, they are running --

Mr Tan: Perhaps the best way, Your Honour, is mark this for identification only, rather than as an agreed bundle.

Her Honour: All right. We will renumber AB4, 5 and 6 to PI, P2 and P3 for identification only.

[emphasis added]

71 It is clear from the above exchanges that the defendants were in fact *objecting* to *all* of the plaintiffs' documents. It appeared, indeed, to be a war of attrition amongst the parties on the documentary front as well.

72 More importantly, however, *the Judge herself* was of the view that the defendants were indeed *objecting* to the introduction of the Documents. In this regard, the following observations in her judgment are more than instructive (GD at [145]):

As it transpired, there was no inspection of the documents in the two supplementary lists. There were no agreed bundles of documents. The documents were produced at the trial as plaintiffs' documents *and objections were taken on the documents in the course of the trial*. I agree with counsel for both the defendants that authenticity of the documents forming the "Damages Bundle" was not deemed admitted under O 27 r 4(1) as the time limit stipulated in r 4(2) to which r 4(1) is subject was not triggered. There was also no agreement to dispense with formal proof of the claims for damages. If O 27 r 4(1) applied or if an agreed bundle had been produced at trial, there would have been no need to produce the originals nor prove the existence or execution of the documents in question. However, it should be noted that O 27 r 4(1) is not concerned with admissibility. It is expressly stated in r 4(1) that the sub-rule does not affect the right of a party to object to the admissibility of any document. Admissibility of the plaintiffs' documents was an issue before me. I should add that in the course of the trial, certain documents in the plaintiffs' bundle of documents were marked for identification. Marking a document for identification at a stage of a trial was a means of avoiding a debate then about authenticity and/or admissibility, *objections having been taken to the tender of the documents*. [emphasis added]

73 It is clear, in our view, that the defendants had in fact objected to the introduction of the Documents. In the circumstances, the plaintiffs ought therefore to have satisfied the requisite requirements under the Evidence Act – in particular those contained in s 66. On this ground alone, the Judge was correct in finding that the Documents were not admitted into evidence. That was, of course, fatal to the plaintiffs' case in so far as the quantum of damages claimed was concerned. We should add that, in the light of this holding, it is unnecessary to delve into great detail on the possible issues arising from O 27 r 4 of the Rules of Court, except to note that our interpretation of O 27 r 4 differed from that of the Judge. At [145] of her GD, the Judge was of the view that authenticity of the Documents was not deemed admitted under O 27 r 4(1) as the time limit stipulated in r 4(2) to which r 4(1) is subject was not triggered. In our view, however, O 27 r 4(1) expressly provides that subject to r 4(2), a party is deemed to admit the authenticity of the documents in his opponent's lists of documents. This suggests that the default position under the Rules of Court is that provided for in r 4(1), namely, that a party is deemed to admit the authenticity of a document contained in his opponent's lists. That being the case, a party is generally deemed to admit authenticity unless he can bring himself within O 27 r 4(2) by showing that he had actually issued a notice of non-admission

within the requisite window of time. Despite this, it is important to note that because we have found that the defendants had in fact objected to the Damages Bundle being introduced into evidence, it is no longer necessary to consider O 27 r 4.

The objection from hearsay

74 We turn now to the issue of the truth or veracity of the documents in the Damages Bundle. Here, as we have already pointed out, the main objection by the defendants centres on the doctrine of hearsay (for an excellent discussion and analysis of the doctrine in the local context, see Jeffrey Pinsler, *Evidence, Advocacy and the Litigation Process* (LexisNexis, 2nd Ed, 2003) at ch 4). The plaintiffs of course argue otherwise. The underlying rationale for the rule against hearsay is set out in a leading textbook as follows (see *Woodroffe & Amir Ali* ([38] *supra*) at p 1726):

The purpose and reason of the hearsay rule is the key to the exceptions to it, which are mainly based on two considerations: a necessity for the evidence and a circumstantial guarantee of trustworthiness. *Hearsay is excluded because it is considered not sufficiently trustworthy. It is rejected because it lacks the sanction of the tests applied to admissible evidence, namely, the oath and cross-examination.* But where there are special circumstances which give a guarantee of trustworthiness to the testimony, it is admitted even though it comes from a second-hand source.

But it has not always been a question of absolute necessity. Sometimes practical convenience, sometimes inability to get evidence of the same value from the same or other source, have been regarded as sufficient. Impossibility, convenience, expediency have all played a part. It may be impossible, or it may cause unreasonable expense or delay, to procure the attendance of a witness who, if present, the court could give direct evidence on the matter in question, and it may also be that this witness has made a statement, either written or verbal, with reference to such matter under such circumstances that the truth of this statement may reasonably be presumed. In such a case, the law, as enacted by s 32, dispenses with direct oral evidence of the fact and with the safeguard for truth provided by cross-examination, and the sanction of an oath, the probability of the statement being true depending upon other safeguards which are mentioned in the following paragraphs. The truth of the declaration is deemed to be *prima facie* guaranteed by the special conditions of admissibility imposed. All the eight clauses of the section are based upon the principle that the statements are of such a nature or were made under such circumstances as to guarantee their being true.

[emphasis added]

And, in the local context, Yong Pung How CJ, in the Singapore Court of Appeal decision of *Soon Peck Wah v Woon Che Chye* [1998] 1 SLR 234, observed thus (at [27]):

The rationale for the hearsay principle is that the witness cannot verify the truth of the facts of which he has no personal knowledge. As the person who does have personal knowledge of the facts is not in court, the accuracy of his perception and his veracity cannot be assessed and tested in cross-examination. Such evidence is unreliable and should hence be excluded from consideration. In Singapore, the rule against hearsay is reflected in s 62 Evidence Act (Cap 97, 1990 Ed).

75 We should point out at this juncture that even if the plaintiffs succeed on the various arguments as to authenticity (which we have held they do not), in order to prevail, they must *also* prevail on this particular issue. Indeed, our findings on the issue of authenticity render it, strictly

speaking, unnecessary to consider the objections based on hearsay. However, in deference to the vigorous arguments rendered by counsel and, in particular, in deference to the efforts made by counsel for the plaintiffs, we turn now to consider the arguments centring on hearsay. However, we should point out at the outset that we do not find the arguments for the plaintiffs on this particular issue persuasive and we find that they therefore fail on this particular issue as well.

76 It is trite law that even where there is an agreed bundle of documents, the *truth* of the contents of the Documents nevertheless remains at issue and is subject to, *inter alia*, objections centring on the doctrine of hearsay.

77 However, it is also true that the rule against hearsay has come under increasing criticism and consequent calls for reform in many other jurisdictions. Significantly, perhaps, the rule itself was abolished in England in the context of civil proceedings (see, in particular, s 1 of the UK Civil Evidence Act 1995 (c 38) as well as *Cross and Tapper on Evidence* (LexisNexis, 10th Ed, 2004) at ch XIII and *Phipson on Evidence* ([57] *supra* at ch 29)). But the rule against hearsay still serves an important function in the context of *criminal* proceedings (and see, especially, s 377 of the Criminal Procedure Code (Cap 68, 1985 Rev Ed)). As we have already emphasised, however, any reform in this area, based as it must be on many policy factors, must necessarily be effected by the Singapore legislature, if at all. In other words, the plaintiffs in the present case must also be able to demonstrate that they can surmount any legal obstacles stemming from the rule against hearsay.

78 As we have already mentioned, we are of the view that the plaintiffs fail on this ground as well. They did not bring themselves within any of the potentially applicable exceptions to the rule against hearsay.

79 We note, first, Mr Shanmugam's reliance on s 35 of the Evidence Act (relating to computer output as evidence). However, this particular provision would appear to be more germane to the issue of *liability* (as opposed to the quantum of damages). The more salient provision would appear to be s 32 of the same Act.

80 In so far as s 32 of the Evidence Act is concerned, the plaintiffs contended that the Judge had failed to consider evidence from John Sheed (the Vessel's subsea engineer) and Sean Roche (the Vessel's rig superintendent) that the makers of the documents had left JDL and their whereabouts were unknown. They went on to assert that courts often accepted that the conditions under s 32 of the Evidence Act were satisfied as long as some evidence had been adduced on the unavailability of the relevant witnesses. We find the plaintiffs' arguments unpersuasive and agree with the Judge that s 32(b) does not assist the plaintiffs in surmounting the rule against hearsay. Section 32(b) itself reads as follows:

32. Statements, written or verbal, of relevant facts made by a person who is dead or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which under the circumstances of the case appears to the court unreasonable, are themselves relevant facts in the following cases:

...

or is made in course of business;

(b) when the statement was made by such person in the ordinary course of business, and in particular when it consists of any entry or memorandum made by him in books kept in the ordinary course of business or in the discharge of professional duty, or of an

acknowledgment written or signed by him of the receipt of money, goods, securities or property of any kind, or of a document used in commerce, written or signed by him, or of the date of a letter or other document usually dated, written or signed by him[.]

81 The requirements of s 32(b) of the Evidence Act have not, in our view, been satisfied. In particular, it has been held that whether or not there is ground for holding that the relevant evidence cannot be procured without unreasonable delay or expense within the meaning of s 33 of the Evidence Act is “purely a question of fact” (see the Madras decision of *A L S K Kadappa Chetti v R S S T Thirupathi Chetti* AIR 1925 Mad 444 at 444, *per* Venkatasubba Rao J).

82 In any event, we also agree with the Judge that the plaintiffs had not surmounted the considerable evidential difficulties surrounding their claim. In particular, the Judge had found that there had been no expert evidence led as to the market or resale value of the equipment lost or damaged beyond repair. She also found that the loss of income on prospective future contracts was too remote. We agree with these findings which are supported by both the facts concerned as well as the relevant legal principles she has cited. Hence, even if the plaintiffs had managed to surmount the evidentiary difficulties (which we hold they had not), their claim would still have failed on more substantive grounds. In the event, the Judge, attempting her level best on the limited evidence left available to her, awarded US\$1m for the lost BOP. We find nothing untoward in this commendable attempt to do justice between the parties in very difficult circumstances.

83 In the premises, we hold that the defendants ought to succeed with regard to *both* the issues of authenticity as well as hearsay, albeit for somewhat different reasons than that adopted by the Judge. In any event, we agree with the Judge’s holding on the substantive issues and therefore affirm her decision on this particular issue relating to the quantum of damages in general and the legal status of the Damages Bundle in particular.

The issue of indemnity between Cameron and Stork

Issues in the present proceedings

84 Turning now to consider issues concerning *liability*, rather than *quantum*, the key question before us was whether Cameron should be entitled to a complete indemnity from Stork against its liability to the plaintiffs. Cameron averred that the sole cause of its liability to the plaintiffs was Stork’s appointment of an inexperienced and unqualified person to conduct the investigation of the Standby Slip Joint. Under the refurbishment contract, Stork had an obligation to conduct a visual and dimensional inspection, which it failed to do. Thus, Stork was clearly in breach of the refurbishment contract, and was liable to Cameron for damages, which would be the entire amount of Cameron’s liability to the plaintiffs.

85 At first instance, the Judge held that Stork was liable to “indemnify” Cameron for 50% of the total damages payable to the plaintiffs. Such a result is *not*, however, possible *if* it is found that, under the *contract* between *Cameron and Stork*, Stork was in breach of contract. In *that* event, Stork would be liable to indemnify Cameron for the entire amount of Cameron’s liability to the plaintiffs. By the same reasoning, if it is found that, under the contract between these parties, Cameron was in breach of contract, then Cameron would be liable to indemnify Stork for the entire amount of Stork’s liability to the plaintiffs. In summary, therefore, what is crucial is an examination of the precise *contractual* terms – both express and (if any) implied – between the parties in the context of the relevant factual matrix in order to ascertain which party was in breach of contract. In this regard, we find that there was no real argument on the point made by counsel for the parties concerned. It is not surprising, therefore, that the Judge did not really consider the point.

86 The *contract* between Cameron and Stork for refurbishment of the Standby Slip Joint imposed an obligation upon Stork to detect any deficiencies in the thickness of the Riser Box wall. In particular, Stork was under an obligation under the contract to conduct a dimensional inspection of the Riser Box in order to detect and repair any deficiencies found therein. That this is so is clear from the various provisions in the purchase order as well as the Quotation, both of which formed the documentary basis for the contract itself. We also note that Stork had issued a letter of compliance to Cameron, which represented that the Standby Slip Joint had been "inspected, repaired and remanufactured and/or tested in accordance with the requirements of ... Cooper Cameron Specs".

87 As it turned out, Prabhuram's failure to conduct a dimensional inspection of the Riser Box constituted, in our view, a breach of contract on the part of his employer, Stork. If so, then if Cameron's liability to pay damages to the plaintiffs can be regarded as "the *natural consequence* of [Stork's] breach of contract, or, in other words, a consequence which might reasonably be supposed to have been within the contemplation of the parties" [emphasis added] (see *Mowbray v Merryweather* [1895] 2 QB 640 at 643), then Cameron would be entitled to a full indemnity from Stork in so far as liability to the plaintiffs is concerned.

8 8 However, this is not, in our view, an end to the matter. Notwithstanding Stork's breach of contract, it is also the case that Cameron had not furnished it (Stork) with the requisite dimensional drawings. In this respect, Cameron submitted that it was *entitled* to assume that Stork knew how to carry out the dimensional inspection and what documents or drawings would be required for such an inspection. In response, Stork averred that Cameron, being the original equipment manufacturer for the Standby Slip Joint, had the primary responsibility to determine the scope of work to be carried out thereon. Accordingly, it was reckless for Cameron not to have provided the dimensional drawings to Stork.

89 It is true that one would be hard-pressed to argue that the requirement to furnish such drawings was an express term of the contract. However, whilst this was *not* the breach of an *express* term of the contract as such, it was, in our view, nevertheless the breach of an *implied term to exercise reasonable care*. Mr Gurbani had, nevertheless, argued that such an implied term, if it indeed existed, had not in any event been pleaded. Whilst a persuasive point at first blush, it is our view that such an implied term was not one that was implied "in *fact*" but was, rather, one that was implied under that *broader* category of "terms implied in *law*". As I observed in the Singapore High Court decision of *Forefront Medical Technology (Pte) Ltd v Modern-Pak Private Ltd* [2006] 1 SLR 927 at [42]–[44]:

42 There is a *second* category of implied terms [*viz*, "terms implied in law"] which is wholly different in its nature as well as practical consequences. Under this category of implied terms, once a term has been implied, such a term will be implied in *all future* contracts of *that particular type*. The precise terminology utilised has varied. In the English Court of Appeal decision of *Shell UK Ltd v Lostock Garage Ltd* [1976] 1 WLR 1187 at 1196, for example, Lord Denning MR utilised the rubric of contracts "of common occurrence", whilst Lloyd LJ in the (also) English Court of Appeal decision of *National Bank of Greece SA v Pinios Shipping Co No 1* [1990] 1 AC 637 (reversed in the House of Lords but not on this particular point) referred to such a category as encompassing "contracts of a defined type" (at 645). But the central idea is clear: it is that the term implied is implied in a *general* way for *all* specific contracts that come within the purview of a broader umbrella category of contracts (reference may also be made, for example, to the House of Lords decisions of *Sally v Southern Health and Social Services Board* [1992] 1 AC 294, especially at 307 and *Malik v Bank of Credit and Commerce International SA* [1998] AC 20 at 45).

43 To distinguish this particular category of implied terms from the first, legal scholars have

referred to it as the category of “terms implied in *law*” (see generally, for example, Sir Guenter Treitel, *The Law of Contract* (Sweet & Maxwell, 11th Ed, 2003) (“Treitel”) at pp 206–213). The first or former category has, in turn, been referred [to as] the category of “terms implied in *fact*” (see generally Treitel, at pp 201–206).

44 The *rationale as well as test* for this broader category of implied terms is, not surprisingly, quite *different* from that which obtains for terms implied under the “business efficacy” and “officious bystander” tests. In the first instance, the category is much broader inasmuch (as we have seen) the *potential* for application *extends* to *future* cases relating to the same issue with respect to the *same category* of contracts. In other words, the decision of the court concerned to imply a contract “in law” in a particular case *establishes a precedent* for similar cases in the future for *all* contracts of *that particular type*, unless of course a higher court overrules this specific decision. Hence, it is my view that courts ought to be as – if not more – careful in implying terms on this basis, compared to the implication of terms under the “business efficacy” and “officious bystander” tests which relate to the *particular contract and parties only*. Secondly, the test for implying a term “in law” is broader than the tests for implying a term “in fact”. This gives rise to difficulties that have existed for some time, but which have only begun to be articulated relatively recently in the judicial context, not least as a result of the various analyses in the academic literature (see, for example, the English Court of Appeal decision of *Crossley v Faithful & Gould Holdings Ltd* [2004] 4 All ER 447 at [33]–[46]).

[emphasis in original]

90 The category of “terms implied in law” is not without its disadvantages. A certain measure of uncertainty will always be an integral part of the judicial process and, hence, of the law itself. This is inevitable because of the very nature of life itself, which is – often to a very large extent – unpredictable. Such unpredictability and consequent uncertainty is of course a double-edged sword. It engenders both the wonder and awe as well as the dangers and pitfalls in life. Given this reality, however, one of the key functions of the courts is not to add unnecessarily to the uncertainty that already exists. Looked at in this light, the category of “terms implied in law” does tend to generate some uncertainty – not least because of the broadness of the criteria utilised to imply such terms, which are grounded (in the final analysis) on reasons of public policy.

91 However, the category of “terms implied in law” has now been firmly woven into the tapestry of our local contract law. It also aids, on occasion at least, in achieving a just and fair result. Most importantly, perhaps, it has formed both the theoretical as well as practical basis for *statutory* implied terms, such as those found in the UK Sale of Goods Act 1979 (c 54) (applicable in Singapore *via* the application of English Law Act (Cap 7A, 1994 Rev Ed) and reprinted as Cap 393, 1999 Rev Ed).

92 What is clear, in our view, is that general reasons of justice and fairness as well as of public policy justify the implication of a “term implied in *law*” in cases such as the present to the effect that each party (here, Cameron and Stork) would owe each other a duty to take reasonable care in the performance of the respective parts of the *contract* they had entered into. In the circumstances, Cameron’s breach of contract would, if it stood *alone*, have entitled *Stork* to a complete indemnity from Cameron based on the same criteria set out above.

93 We do note Mr Gurbani’s argument on behalf of Cameron (and briefly alluded to above) that the issue relating to a “term implied in law” was not pleaded. However, given the *very nature* of such a category of implied terms, we are of the view that it ought to be recognised by the court *as a matter of law*. We do reiterate that the parties themselves had not canvassed in an adequate manner the broader issue, of which the argument from implied terms is only a part. This was the issue

of the *contractual position in relation to the respective claims for an indemnity by Cameron and Stork*. It was a vital issue. It was not something which this court could, with any sort of equanimity, afford to ignore. After all, the issue relating to an *indemnity* was raised in the pleadings and, of course, at the trial itself. But, at the risk of belabouring the point, it was not canvassed adequately. We could not now leave it "hanging in the air", so to speak, especially since we are the final appellate court in so far as these proceedings are concerned. During the hearing before us, Mr Gurbani himself was given an ample opportunity to argue that, based on the *contractual terms* between Cameron and Stork, Cameron was entitled to a full indemnity from Stork. Needless to say, he took this opportunity. Mr Yeo was also given an ample opportunity to argue the point and he, too, took the opportunity, arguing his case on a number of different fronts (including, significantly in our view, the argument from an implied term). We see no injustice resulting to the parties. Indeed, as we have observed, a duty to take reasonable care in the performance of the contract arising from the implication of a term "in law" was applicable to *both Cameron and Stork*.

94 Given that Cameron had breached an implied term (in law) to take reasonable care *vis-à-vis* its contract with Stork inasmuch as it had not furnished the requisite dimensional drawings to Stork, what, then, is the position with regard to Stork inasmuch as it (Stork) has *also*, as we have held, breached the same contract by not (according to the express terms of the contract) conducting a dimensional inspection of the Riser Box in order to detect and repair any deficiencies found therein?

95 There are, in our view, two approaches open to this court with respect to the present factual matrix.

96 The first is that the contractual duty by way of an implied term placed upon Cameron as discussed above is a *condition precedent* to the performance of the contractual duty placed by way of an express term upon Stork to conduct the dimensional inspection of the Riser Box. However, it is not in our view wholly clear that such an implied term was indeed a condition precedent. In any event, it is unnecessary to pursue this particular issue as we are of the view that by proceeding with the dimensional inspection of the Riser Box, Stork had *waived* any condition precedent that would have otherwise existed. Indeed, it might be persuasively argued that Stork had even waived the breach of the implied term by Cameron.

97 A second (and alternative) approach is to consider the situation on the basis that the implied term placed upon Cameron was *not a condition precedent*. This is in fact the approach that we must now focus on, given our rejection of the first approach as set out briefly in the preceding paragraph. In the circumstances, therefore, we must proceed on the basis that *both* Cameron and Stork had breached their contract and consider the legal consequences of the respective breaches accordingly.

98 This situation (where both parties are in breach of contract) has not, to the best of our knowledge, received much treatment in the case law. However, the following observations by Kerr LJ in the English Court of Appeal decision of *State Trading Corporation of India Ltd v M Golodetz Ltd* [1989] 2 Lloyd's Rep 277 at 286 are apposite:

The fact that in the present case both parties had committed breaches before one of them elected to treat the contract as repudiated appears to me to make no difference whatever; nor the fact that (assumedly) both had been breaches of condition. *If A is entitled to treat B as having wrongfully repudiated the contract between them and does so, then it does not avail B to point to A's past breaches of contract, whatever their nature.* A breach by A would only assist B if it was still continuing when A purported to treat B as having repudiated the contract *and* [this emphasis is in the original text] if the effect of A's subsisting breach was such as to preclude A from claiming that B had committed a repudiatory breach. In other words, B would have to show

that A, being in breach of an obligation *in the nature of a condition precedent*, was therefore not entitled to rely on B's breach as a repudiation. [emphasis added]

99 The observations just quoted are both logical and principled. Applying them to the facts before us, we have already held that the implied term of the contract which was breached by Cameron was *not* a condition precedent. Hence, this particular breach of contract by Cameron did *not*, in our view, preclude Cameron from claiming an indemnity from Stork for the latter's breach of contract in not conducting a proper dimensional inspection of the Riser Box. But this is not an end to the matter. Let us elaborate.

100 In our view, the contractual obligation on the part of Stork to conduct a dimensional inspection of the Riser Box was not an absolute one. It only required Stork to perform this obligation with reasonable care. Such a contractual duty would of course be *coincident* with its duty of care in the *tortious* context. This is an important point because the fact that the concept of contributory negligence has *not* been introduced in the sphere of contract law *generally* is immaterial to the extent that the duty owed by Stork to Cameron was, as just stated, a *concurrent* one in contract and tort. The Singapore position in this regard is clear: the doctrine of *contributory negligence* is applicable where the defendant's liability in contract is the same as his or her liability in the tort of negligence independently of the existence of any contract (see the decision of this court in *Fong Maun Yee v Yoong Weng Ho Robert* [1997] 2 SLR 297 ("*Fong Maun Yee*"), where the leading English decision in *Forsikringsaktieselskapet Vesta v Butcher* [1989] AC 852 ("the *Vesta* case") was adopted and followed (the House of Lords did not, however, deal specifically with this particular point although the Court of Appeal and High Court did, with the Court of Appeal decision also being reported in the citation just given)). As an interesting aside, the Judge did in fact refer to both *Fong Maun Yee* and the *Vesta* case (see GD at [119]–[121]), but this was in relation to the reliance by Cameron on the doctrine of contributory negligence with respect to its alleged liability to *the plaintiffs* (with whom it had, of course, a *contractual* relationship as well). Unfortunately, however, counsel concerned did *not* apply these cases to the issue of indemnity between *Cameron and Stork*.

101 In the *Vesta* case itself, Hobhouse J (as he then was) helpfully set out (at first instance) the three categories which might arise in relation to the possible invocation of the defence of contributory negligence in contract, as follows (see *Forsikringsaktieselskapet Vesta v Butcher* [1986] 2 All ER 488 at 508):

The question whether the 1945 Act [the UK Law Reform (Contributory Negligence) Act 1945, on which the Singapore Contributory Negligence and Personal Injuries Act (Cap 54, 2002 Ed) is in fact based] applies to claims brought in contract can arise in a number of classes of case. *Three categories* can conveniently be identified.

(1) Where the defendant's liability arises from some contractual provision which does not depend on negligence on the part of the defendant.

(2) Where the defendant's liability arises from a contractual obligation which is expressed in terms of taking care (or its equivalent) but does not correspond to a common law duty to take care which would exist in the given case independently of contract.

(3) Where the defendant's liability in contract is the same as his liability in the tort of negligence independently of the existence of any contract.

[emphasis added]

As already alluded to above, the House of Lords did not deal with the issue of contributory negligence as a defence in contract. However, both Hobhouse J (at first instance) and the Court of Appeal held (as we have also noted above) that the doctrine of contributory negligence was available as a defence in contract – but only in *category (3)*, as set out in the above quotation, which relates to a situation of *concurrent* liability in contract and tort.

Contributory negligence in contract – developments and devices

102 Although the position in Singapore is (as we have already noted) presently that as set out in the *Vesta* case, the position with regard to the issue of contributory negligence in contract is still, however, in a state of development across many Commonwealth jurisdictions. A succinct account of developments across various jurisdictions may in fact be found in the UK Law Commission's Report entitled *Contributory Negligence as a Defence in Contract* (Law Com No 219, 1993) at paras 2.7–2.19.

103 To take but a more specific sampling of various positions and developments in the sphere of the common law, the High Court of Australia held, in *Astley v Austrust Ltd* (1999) 161 ALR 155 (Callinan J dissenting), that the defence of contributory negligence would not apply *even in* a situation of concurrent liability in contract and tort. This decision was not well received generally and it came as no surprise when various Australian state legislatures effected various amendments to the equivalent of the Singapore Contributory Negligence and Personal Injuries Act (Cap 54, 2002 Rev Ed) (see, for example, J W Carter & D J Harland, *Contract Law in Australia* (Butterworths, 4th Ed, 2002) at para 2129 and N C Seddon & M P Ellinghaus, *Cheshire & Fifoot's Law of Contract* (LexisNexis Butterworths, 8th Australian Ed, 2002) at para 23.28). In contrast, the New Zealand position is the same as that which exists in Singapore and England: see the New Zealand High Court decision of *Rowe v Turner Hopkins & Partners* [1980] 2 NZLR 550 (reversed on appeal in [1982] 1 NZLR 178, but not on this point and where the New Zealand Court of Appeal left open for future consideration an even *broader* approach), which was in fact cited and applied in the *Vesta* case (though it might be noted that Cooke P in the New Zealand Court of Appeal decision of *Mouat v Clark Boyce* [1992] 2 NZLR 559 at 564 preferred the view that contributory negligence could apply in contract in its *widest sense* (which would encompass the first class of cases referred to in the *Vesta* case as well)). The position embodied in the *Vesta* case was in fact ultimately advocated by the UK Law Commission in their Report ([102] *supra*) and was in contrast to its earlier Working Paper (also entitled *Contributory Negligence as a Defence in Contract* (Working Paper No 114, 1990)) which advocated that contributory negligence be permitted as a defence in contract in its *widest sense* (see also *per* Cooke P in *Mouat v Clark Boyce*). Indeed, the New Zealand Law Commission also proposed a similarly wide legislative reform (see *Apportionment of Civil Liability* (Report 47, May 1998)).

104 We also note that courts in other jurisdictions have sought to achieve the same effect as the introduction of contributory negligence in contract by resort to *other contractual devices*.

105 One such device is that of "*anticipatory mitigation*" (see, for example, the oft-cited decision of Saunders J in the Ontario High Court of Justice case of *Tompkins Hardware Ltd v North Western Flying Services Ltd* (1982) 139 DLR (3d) 329 ("the *Tompkins Hardware* case"), applied (most notably) in the (also oft-cited) Ontario High Court of Justice case of *Ribic v Weinstein* (1982) 140 DLR (3d) 258 and described by Lacourcière JA, delivering the judgment of the Ontario Court of Appeal in *Cosyns v Smith* (1983) 146 DLR (3d) 622 at 628, as embodying an "attractive conclusion"). As Saunders J put it in the *Tompkins Hardware* case (at 341), where the negligence of the plaintiff "created the situation where the damage occurred", "there should ... be apportionment whether the action be brought in contract or in tort". We do *not* think that the learned judge intended to impose a stringent condition to the effect that the plaintiff must be *wholly* responsible for the situation where the

damage occurred and that his observation must be read in the light of the *actual facts* of the *Tompkins Hardware* case itself (see also the New Brunswick Court of Appeal decision of *Coopers & Lybrand v H E Kane Agencies Ltd* (1985) 17 DLR (4th) 695 at 708 (reference to the plaintiff being the cause of his or her loss “in part”). Nevertheless, this device of “anticipatory mitigation” might run into another difficulty – that the concept of mitigation in the law of contract refers to a situation that occurs *after* the breach concerned (see also, for example, John Burrows, Jeremy Finn & Stephen Todd, *Law of Contract in New Zealand* (LexisNexis, 2nd Ed, 2002) at p 799). Notwithstanding the logical persuasiveness of this last-mentioned argument, we would not dismiss this device out of hand (which was in fact endorsed in S M Waddams, *The Law of Contracts* (Canada Law Book Inc, 4th Ed, 1999) at para 773). It is, however, unnecessary for us to decide on this point in the light of our finding above that there is concurrent liability in contract and tort in the present proceedings and that the principle in *Fong Maun Yee* ([100] *supra*) applies. We therefore say no more about it in the context of the present proceedings.

106 Another contractual device centres on the possible application of the principles of *remoteness of damage* that have their genesis in the seminal English Court of Exchequer decision of *Hadley v Baxendale* (1854) 9 Exch 341; 156 ER 145. Indeed, most recently, the Singapore High Court decision of *CHS CPO GmbH v Vikas Goel* [2005] 3 SLR 202 reaffirms the fact that the principles established in *Hadley v Baxendale* continue to be the law in the Singapore context despite doubts expressed in the New Zealand context (see at [87], not following the New Zealand Court of Appeal decision of *McElroy Milne v Commercial Electronics Ltd* [1993] 1 NZLR 39). In so far as the present case is concerned, the argument would be to the effect that where the plaintiff has been guilty of contributory negligence, any damage caused as a result would be too remote as it would fall outside the scope of the first limb set out in *Hadley v Baxendale*, which relates to “ordinary” or “natural” damage (and *cf* the New Brunswick Court of Appeal in *Doiron v Caisse Populaire d’Inkerman Ltée* (1985) 17 DLR (4th) 660 (“the *Doiron* case”) at 680–681 as well as the English Court of Appeal decision of *Sayers v Harlow Urban District Council* [1958] 1 WLR 623, especially at 625). This, however, does raise a related issue as to whether or not such damage would also be too remote as it would *also* fall outside the *second* limb of *Hadley v Baxendale* as well, which relates to “special” or “non-natural” damage (*cf* the *Doiron* case at 682). Here, *actual* knowledge must be brought home to the defendant in order that the damage might not be considered to be too remote. This is, generally speaking, also an interesting argument but, once again, it is unnecessary for us to decide on this point in the light of our finding above and we therefore also say no more about it in the context of the present proceedings.

107 One further possible contractual device is to utilise the concept of the *implied term* to the effect that the plaintiff would exercise due care for his or her own interest (see Nick Seddon, “Contract Damages Where Both Parties Are at Fault” (2000) 15 JCL 207 at 215–216). Again, this is an argument that we need not deal with at the present time although it must be emphasised that a court will *not lightly* imply a term into a contract. There are of course two established categories of implied terms – “terms implied in fact” and “terms implied in law”, respectively. We have already dealt with the latter (and broader) category briefly above (see [89]–[92]). In so far as the former category is concerned, the criteria, whilst different, are no less stringent. Indeed, there are two oft-cited tests in order to find “terms implied in fact”, which I have summarised in *Forefront Medical Technology (Pte) Ltd v Modern-Pak Private Ltd* ([89] *supra*), as follows (at [29]–[32]):

29 It has always been acknowledged that particular terms might be implied into particular contracts. However, in order not to undermine the concept of freedom of contract itself, terms would be implied only rarely – in exceptional cases where, as one famous case put it, it was *necessary* to give “*business efficacy*” to the contract (see *per* Bowen LJ (as then was) in the English Court of Appeal decision in *The Moorcock* (1889) 14 PD 64). In the words of Bowen LJ

himself (at 68):

Now, an implied warranty, or, as it is called, a covenant in law, as distinguished from an express contract or express warranty, really is in all cases founded on the presumed intention of the parties, and upon reason. The implication which the law draws from what must obviously have been the intention of the parties, the law draws with the object of giving efficacy to the transaction and preventing such a failure of consideration as cannot have been within the contemplation of either side; and I believe if one were to take all the cases, and there are many, of implied warranties or covenants in law, it will be found that in all of them the law is raising an implication from the presumed intention of the parties with the object of giving to the transaction such efficacy as both parties must have intended that at all events it should have. In business transactions such as this, what the law desires to effect by the implication is to give such business efficacy to the transaction as must have been intended at all events by both parties who are business men; not to impose on one side all the perils of the transaction, or to emancipate one side from all the chances of failure, but to make each party promise in law as much, at all events, as it must have been in the contemplation of both parties that he should be responsible for in respect of those perils or chances.

30 Indeed, Lord Esher MR adopted a similar approach, although it is Bowen LJ's judgment that is most often cited. This is probably due to the fact that a close perusal of Lord Esher MR's judgment will reveal that the learned Master of the Rolls did not *explicitly* adopt the "business efficacy" test as such. It might be usefully observed at this juncture that the third judge, Fry LJ, agreed with both Bowen LJ and Lord Esher MR (see [29] *supra* at 71).

31 There was another test, which soon became equally famous. It was by MacKinnon LJ in another English Court of Appeal decision. This was the famous "*officious bystander*" test which was propounded in *Shirlaw v Southern Foundries (1926) Limited* [1939] 2 KB 206 at 227 ("*Shirlaw*") (affirmed, [1940] AC 701), as follows:

If I may quote from an essay which I wrote some years ago, I then said: "Prima facie that which in any contract is left to be implied and need not be expressed is something so obvious that it goes without saying; so that, if, while the parties were making their bargain, an officious bystander were to suggest some express provision for it in their agreement, they would testily suppress him with a common 'Oh, of course!'"

At least it is true, I think, that, if a term were never implied by a judge unless it could pass that test, he could not be held to be wrong.

Interestingly, the essay referred to above was in fact a public lecture delivered at the London School of Economics in the University of London: see Sir Frank MacKinnon, *Some Aspects of Commercial Law – A Lecture Delivered at the London School of Economics on 3 March 1926* (Oxford University Press, 1926) (and see, especially, p 13).

32 Both these tests are firmly established in the local case law (in addition to the cases cited below, see also, for example, *Lim Eng Hock Peter v Batshita International (Pte) Ltd* [1996] 2 SLR 741 at 745–746, [13]–[15] (affirmed in *Batshita International (Pte) Ltd v Lim Eng Hock Peter* [1997] 1 SLR 241) and *Chai Chung Ching Chester v Diversey (Far East) Pte Ltd* [1991] SLR 769 at 778, [34] (affirmed in *Diversey (Far East) Pte Ltd v Chai Chung Ching Chester* [1993] 1 SLR 535), with regard to the "business efficacy" and "officious bystander" tests, respectively.

[emphasis in original]

108 Yet another (even more fundamental) device is simply to argue that the breach of contract did *not* cause the damage concerned (see, for example, the English Court of Appeal decision of *Quinn v Burch Bros (Builders) Ltd* [1966] 2 QB 370). Indeed, where it can be established that a *novus actus interveniens* has broken the chain of causation, the defendant will be freed from liability (see, for example, the (also) English Court of Appeal decision of *Beoco Ltd v Alfa Laval Co Ltd* [1995] QB 137). It should be noted, however, that this device almost invariably results in an “all or nothing” result (though *cf* the English Court of Appeal in *Tennant Radiant Heat Ltd v Warrington Development Corporation* [1988] 1 EGLR 41, which was endorsed in English High Court decision of *W Lamb Ltd v J Jarvis & Sons plc* (1998) 60 Con LR 1; though *cf*, in turn, the *obiter* observations by the (also) English Court of Appeal in *Bank of Nova Scotia v Hellenic Mutual War Risks Association (Bermuda) Ltd* [1990] 1 QB 818 at 904). However, we find that this particular device is not applicable on the facts of the present proceedings and therefore say no more about it here.

109 The rationale of fairness has been a powerful underlying legal impetus for the various attempts to introduce the doctrine in contract (or devices that would, in substance, achieve the same result). For example, La Forest JA (as he then was), delivering the judgment of the New Brunswick Court of Appeal in the *Doiron* case, observed thus ([106] *supra* at 673):

What the ... authorities demonstrate to me is that the doctrine of apportionment of loss where contributory negligence arises in contract cases is here to stay. There are strong underlying policy reasons favouring this approach and the courts, using one technical device or another, will, I venture to think, continue to respond to these by applying the doctrine.

110 Having determined that the equivalent of our Contributory Negligence and Personal Injuries Act did not apply to a situation involving a breach of contract, the learned judge was nevertheless of the view (at 677) that “there does not seem to be any inherent requirement in contract law dictating an absolutist doctrine of liability”. La Forest JA was of the view (at 679) that “[a]s 19th century judges responded to the ethos of their times, so must we to ours” and that “[c]ontribution is now consistent with prevailing theories of both the law and the market-place”; he then added, simply albeit significantly, thus (see *ibid*): “And it meets our sense of fairness.” While not advocating contribution as a mandatory rule as such, the learned judge appeared ultimately to adopt a test akin to the remoteness test in *Hadley v Baxendale* (see [106] above).

111 La Forest JA also referred to the concept of legitimate expectations (at 682). This concept has in fact been endorsed in the Singapore context, in the Singapore Court of Appeal decision of *Tribune Investment Trust Inc v Soosan Trading Co Ltd* [2000] 3 SLR 405, for example, Yong Pung How CJ observed in no uncertain terms (at [40]) that “the function of the court is to try as far as practical experience allows, to ensure that the reasonable expectations of honest men are not disappointed” (see also the extrajudicial lecture by Lord Steyn, “Contract Law: Fulfilling the Reasonable Expectations of Honest Men” (1997) 113 LQR 433). However, whilst the concept of reasonable expectations is an important one, it has not, at this point in time at least, attained the status of a substantive legal doctrine in and of itself. In this regard, therefore, any argument in favour of contributory negligence in contract must be premised, in our view, on established and substantive doctrines such as those referred to above.

112 However, in the New Brunswick Court of Appeal decision of *Coopers & Lybrand v H E Kane Agencies Ltd* ([105] *supra*), Stratton JA, who delivered the judgment of the court, adopted an extremely broad, albeit (with respect) vague, approach as follows (at 708):

Whether one accepts the argument that at common law damages could be apportioned in actions in contract as well as in actions of tort and that the *Contributory Negligence Act* ... should be applied by analogy, or adopts the theory of the reasonable expectations of the parties, or the notion of reliance that was either qualified or unreasonable, or simply that in fairness and to do justice the damages ought to be apportioned, I do not think that in the circumstances of this case the trial judge erred in concluding that the actions of the company president, Harold Kane, and of Charles Kane, its employee, contributed to the company's loss. Nor am I able to say that the apportionment of the degrees of fault of each party is wrong. [emphasis added]

113 In summary, developments in other jurisdictions are instructive and relevant inasmuch as they give legal food for thought in so far as development of the law in the Singapore context along the lines of legislation and/or case law are concerned. But there is no need to explore – let alone invoke – them in the present proceedings as the position in *Singapore*, as we have noted, is clear at the present time. It follows that established in the *Vesta* case (and see generally [100] above). And it is to the *application* of those principles to the facts of the present proceedings that our attention must now turn. We note, however, that in situations where (unlike the present) there is *no concurrent* liability in tort and contract, the invocation of one or more of the devices just mentioned may be important in order to ensure that justice and fairness is achieved if the Singapore legislature does not amend the law in the meantime. We should hasten to add that by utilising the terminology of “devices”, we do not intend to imply any pejorative meaning. After all, these are perfectly valid legal doctrines in their own right, although they are not conventionally invoked (hence, the terminology utilised).

Our decision in the present proceedings

114 Returning to the facts of the present case, the issue that arises (given the present legal position in the Singapore context as established in this court's decision in *Fong Maun Yee* ([100] *supra*)) is whether or not there was contributory negligence on the part of Cameron, given our finding above that Stork owed Cameron *concurrent* duties in *both* contract *and* tort. We have already noted that Cameron had not furnished Stork with the requisite dimensional drawings. We have also held that this was in fact a breach of an implied term (in law) by Cameron. In so far as the issue of contributory negligence is concerned, we do not even need to go so far. Indeed, the existence of a legal duty is not necessary for the purposes of establishing contributory negligence on the part of the plaintiff. For example, in the English Court of Appeal decision of *Lewis v Denye* [1939] 1 KB 540, du Parc LJ observed thus (at 554–555):

In order to establish the defence of contributory negligence, the defendant must prove, first, that the plaintiff failed to take “ordinary care for himself,” or, in other words, such care as a reasonable man would take for his own safety, and, secondly, that his failure to take care was a contributory cause of the accident. The doctrine of contributory negligence “cannot be based upon a breach of duty to the negligent defendant.”

115 And, in the (also) English Court of Appeal decision of *Davies v Swan Motor Co (Swansea) Ltd* [1949] 2 KB 291, Denning LJ (as he then was) observed as follows (at 324–325):

When a man steps into the road he owes a duty to himself to take care for his own safety, but he does not owe any duty to a motorist who is going at an excessive speed to avoid being run down. Nevertheless, if he does not keep a good lookout, he is guilty of contributory negligence. *The real question is not whether the plaintiff was neglecting some legal duty, but whether he was acting as a reasonable man and with reasonable care.* [emphasis added]

116 In our view, the failure by Cameron to furnish Stork with the requisite dimensional drawings did, having regard to the relevant facts and circumstances, in fact constitute *contributory negligence*. In this regard, the following observations in the following article by Ariel Porat, "Contributory Negligence in Contract Law: Toward a Principled Approach" (1994) 28 UBC L Rev 141 at 153 might also be usefully noted:

Lack of information essential to contract performance is sometimes liable to result in a breach. If the aggrieved party possesses such information but fails to convey it to the party in breach, even knowing it to be essential to performance, it might be appropriate to reduce damages to the aggrieved party on account of contributory negligence. In extreme cases, when non-disclosure is either deliberate or fraudulent, the conduct of the aggrieved party should be viewed as justifying the full exoneration of the party in breach.

117 Whilst there was no fraud or similar conduct on the part of Cameron, having regard to all the circumstances of the case, we find that there was contributory negligence on the part of Cameron to the extent of 50%.

118 At this juncture, we need to clarify the amounts payable by both Cameron and Stork and, to this extent, the respective amounts awarded by the court below will need to be modified accordingly.

119 It will be recalled that the Judge had held that Cameron and Stork were equally liable to the plaintiffs, and therefore ordered Stork to indemnify Cameron for 50% of the total damages. In other words, Stork was liable to indemnify Cameron in the sum of US\$500,000 for the total amount of US\$1m awarded to the plaintiffs with respect to the loss of the BOP stack, leaving aside the nominal damages payable in respect of the other pleaded heads of damage. With respect, we note that there has been some confusion inasmuch as there has been some (unintentional) conflation of two separate and distinct issues.

120 The first concerns Cameron's and Stork's respective liability to the plaintiffs. Here, the Judge held that the former parties were equally liable to the latter. This would mean, in so far as the BOP stack was concerned, that, notwithstanding Cameron's *prima facie* liability for the full sum of US\$1m awarded with regard to this particular item, Stork ought to share in that liability as well (to the extent of 50%). In other words, Cameron and Stork were liable in the sum of US\$500,000 each *to the plaintiffs* (a holding which we endorse). Looked at in this light, the concept of "indemnity" as utilised by the Judge was, with the greatest of respect, liable to lead to some confusion inasmuch as it suggested that the concept applied to the relationship between *Cameron and Stork*. We do not in fact think that the Judge intended the concept to be utilised in that fashion. She was, in our view, utilising the concept of "indemnity" in a *broader* sense in so far as it referred to the respective liability of Cameron and Stork *to the plaintiffs*. Perhaps the more appropriate concept to utilise would be that of "contribution".

121 The conceptual distinction between contribution and indemnity, in its true form, was discussed in *Driver v William Willett (Contractors) Ltd* [1969] 1 All ER 665, a case that was cited by Cameron. In that case, an employer and its consultants were found to be jointly liable for injury caused to an employee. The court found that the employer and the consultants were respectively liable to the employee for 40% and 60% of his loss respectively. The court then went on to consider whether the employer was entitled to recover its 40% liability to the employee as damages for breach of contract from the consultants. Rees J clearly drew a distinction between apportionment and indemnity, opining (at 674):

... I apprehend that the question which I have to answer is as to whether the evidence

established that the damage suffered by *the employers* as a result of the plaintiff's claim was caused by the consultants' breach of contract. The apportionment of responsibility for the accident as between tortfeasors, both held to be liable to an injured plaintiff, involves considerations of causative potency as well as blameworthiness. *It does not necessarily decide the issue of damages for breach of a contract as between the two tortfeasors.* [emphasis added]

122 Notwithstanding the Judge's determination that Stork was liable for 50% of the plaintiffs' losses, there remained the issue of how the concept of "indemnity" applies (in its *narrower* sense) to *the specific legal relationship between Cameron and Stork* (and which we alluded to briefly at the outset of this part of our judgment). In other words, would (as was in fact claimed by counsel for Cameron) Cameron be entitled to claim a *full* indemnity for US\$500,000 *from Stork* on the basis that *Stork had breached its contractual obligations to Cameron*? If so, then Cameron would not have to pay any damages at all since *Stork* would then *wholly* bear the legal responsibility in so far as the amount of US\$1m awarded to the plaintiffs with regard to the BOP stack was concerned. Given our finding that Stork had indeed breached its contractual duty to conduct a dimensional inspection of the Riser Box, this would appear to be the result at first blush. *However*, having regard to our finding of *contributory negligence in so far as the contract between Cameron and Stork is concerned (to the extent of 50%)*, we are of the view that Cameron is *not* entitled to a *full* indemnity from Stork. We therefore allow Cameron's appeal in part only on this particular issue, and order Stork to indemnify Cameron in the sum of US\$250,000 instead. To the extent that *Stork* is *itself* liable for 50% of the damages of US\$1m payable *to the plaintiffs* (*viz*, US\$500,000), it would, *in toto*, have to indemnify (and we note, here, that the concept of indemnity is used in a very *general* sense, and not as a term of art) Cameron *in the (total) sum of US\$750,000*. Perhaps the more *accurate* manner of putting it would be to state that Stork is liable to contribute US\$500,000 to Cameron for its part in the damage caused *to the plaintiffs* and is also liable to indemnify Cameron in the sum of US\$250,000 for breaching its contractual obligation which it owed to Cameron. If, of course, we had found no contributory negligence on the part of Cameron, then Stork would have had to indemnify Cameron in the sum of US\$500,000. In other words, Cameron would not, in the final analysis, have been liable to pay any damages at all with regard to the loss of the BOP stack as Stork would have had to bear Cameron's share of the liability in this regard as well since it had breached its contractual obligation to Cameron. In the circumstances, however, we *did* in fact find that there had been contributory negligence on the part of Cameron. We reiterate that the doctrine of contributory negligence was applicable to the *contractual* relationship between Cameron and Stork simply because Stork owed *concurrent* duties in both contract *and* tort to Cameron. As we have observed, there might well be a case for *broadening* the law in this area by allowing contributory negligence to apply even where the duties in contract and tort are not identical. Of course, the *broadest* application would be to allow this doctrine to apply even where there is a *strict contractual* duty *only* (*ie*, a *category (1)* case as described at [101] above). That said, as we have also briefly alluded to above, there are *other contractual devices* that might serve as *possible alternatives* to the doctrine of contributory negligence. However, it is *unnecessary* to consider any of these broader applications and/or contractual devices in the present case. We would simply apply the previous decision of this court in *Fong Maun Yee* ([100] *supra*), which held that the doctrine of contributory negligence applies in a contractual context where the defendant owes the plaintiff *concurrent* duties in contract *and* tort.

123 Finally, we reiterate the need to distinguish clearly amongst the various legal relationships concerned. In particular, the respective liability of the defendants to the plaintiffs is (as we have endeavoured to point out) quite different from that between the defendants themselves. This latter relationship is contractual in nature and it would, in our view, conduce towards clarity if the concept of "indemnity" is confined to this particular relationship. We observe that counsel concerned could have been more helpful to the Judge in this regard as this would have avoided the slight legal wrinkle

which we have now had to iron out. We turn now to consider the other issues arising in the instant case.

Other issues

Introduction

124 We turn now to the remaining issues. They can be dealt with briefly. They were not the focus of counsel's argument on appeal. More importantly, we are in full agreement with the reasoning of the Judge with regard to these issues. Indeed, she dealt with them in a comprehensive and (if we may say so) admirable fashion. In our view, when justice has therefore been achieved at first instance in accordance with the relevant legal rules and principles, words from the appellate court ought, from the perspectives of logic, common sense and fairness, to be few.

Identity of the fractured slip joint

125 The issue of the identity of the fractured slip joint was, in our view, a question of fact for the Judge and, based on existing legal principles well known to all concerned and which permit an appellate court to interfere with the findings of fact by a trial judge in limited circumstances only, we find no reason to interfere with her findings of fact. We found her analysis to be both thorough and persuasive and therefore do not find it necessary to add anything to it.

Title to sue

126 We also find the Judge's analysis and findings on the issue of title to sue with respect (in particular) to both JDL and MEP to be both cogent and fair, and have nothing to add.

The legal liability of Cameron to the plaintiffs

127 The legal liability of Cameron to the plaintiffs was premised on contract as well as tort.

128 Turning briefly to arguments in the contractual sphere, we find the Judge's holding to the effect that Cameron had been in breach of the implied terms to utilise skill and care to be justified by the facts as well as the context of the case. We would only add that although the Judge appeared to characterise these implied terms as "terms implied in fact", there was no reason in principle why the learned judge could not have characterised them as "terms implied in law" instead (see also generally the analysis at [89]–[92] above).

129 In so far as liability in tort was concerned, the Judge, correctly in our view, characterised the duty of care as being co-extensive with that which existed in contract. We also note that the learned judge had utilised the three-part test enunciated by the House of Lords in *Caparo Industries Plc v Dickman* [1990] 2 AC 605. This particular test is well established and has been applied in the Singapore context (see, for example, the Singapore Court of Appeal decisions of *Ikumene Singapore Pte Ltd v Leong Chee Leng* [1993] 3 SLR 24; *Mohd bin Sapri v Soil-Build (Pte) Ltd* [1996] 2 SLR 505; *RSP Architects Planners & Engineers v MCST Plan No 1075* [1999] 2 SLR 449; and *United Project Consultants Pte Ltd v Leong Kwok Onn* [2005] 4 SLR 214). The law relating to the tortious duty of care in the context of recovery for pure economic loss is, however, a confused and confusing one. On a positive note, however, it is also gradually evolving and the legal position is by no means the same in all Commonwealth jurisdictions. It may well be the case that Singapore law might need to be refined at some future point in time in order to integrate the best from these other cases. This would ensure that there is rich legal soil from which the fruit of justice and fairness can emerge. However, this is

not an appropriate occasion. Whichever test is adopted, it is clear, on the facts, that Cameron owed a duty of care to the plaintiffs and had breached it. The Judge's analysis and reasoning in this regard was thorough and persuasive and we have nothing useful to add. Indeed, it might even be argued that the present proceedings involved a straightforward situation of physical damage involving an equally straightforward application of the principles laid down in the seminal House of Lords decision of *Donoghue v Stevenson* [1932] AC 562. However, we need not even go so far for, as we have already noted, even applying the narrower test with regard to the tortious duty of care in the context of recovery for pure economic loss, we would also hold that Cameron was indeed liable to the plaintiffs for the breach of a duty of care.

130 We also agree with the Judge that the plaintiffs' argument, that the certificate of compliance ("COC") dated 23 December 1998 was itself a warranty, ought to be rejected, having regard to the circumstances of the case (see GD at [64]). Indeed, the context clearly demonstrates that there had been no intention to create legal relations and there was, therefore, no contractual relationship established in the first instance. We also note that the Judge considered whether or not the statements in the COC constituted negligent misstatements instead under the principle first enunciated in the seminal House of Lords decision of *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465. In this last-mentioned regard, we agree with her application of the law to the facts in the present proceedings (in particular, her holding that no reliance on the COC had been proved, the element of reliance being of course a crucial element in this particular sphere of the law of negligence).

The legal liability of Stork to the plaintiffs

131 We agree with the findings of the Judge on the issue of the legal liability of Stork to the plaintiffs. It was clear that Stork was indeed in breach of a duty of care owed to the plaintiffs. We have nothing useful to add to the analysis and findings of the Judge in this particular regard.

Exception clauses

132 The Judge held that Cameron could not rely upon the exception clauses concerned *vis-à-vis* the plaintiffs. In particular, she held that these clauses had not been incorporated into the contract in question and that, in any event, the clauses themselves did not cover the situation that was the subject of the present proceedings. We agree with the Judge's analysis and reasons and have nothing useful to add, save to state that there was some suggestion that there might have been a possible course of dealings (see GD at [112]). However, this point was not pursued by Cameron. Not surprisingly, there is in fact no evidence in this particular regard.

The doctrine of novus actus interveniens

133 The reliance by Cameron on an alleged *novus actus interveniens* on the part of the plaintiffs is, in our view, without merit. In particular, Cameron alleged a failure on the part of the plaintiffs (principally, on the part of JHL and JSL) to properly inspect or maintain the Standby Slip Joint as well as to properly inspect the said slip joint prior to using it on 16 March 2001. However, we agree with the Judge that the plaintiffs were entitled to assume that Cameron had fulfilled its contractual obligations owed to them without having to carry out any inspections or maintenance. It seems to us that this is not only just and fair but also commonsensical. In any event, Cameron had not furnished the plaintiffs with the requisite drawings that would have enabled them to carry out inspections or maintenance, even assuming that there was a duty on the plaintiffs to do so in the first instance. Further, the essence of a *novus actus interveniens* required an act on the part of the plaintiffs whose nature was sufficient to break the chain of causation. We agree with the Judge that the alleged act

(or omission, rather) fell short of constituting a *novus actus interveniens* on the part of the plaintiffs.

The doctrine of contributory negligence

134 Cameron also relied on the doctrine of contributory negligence with respect to its alleged liability to the plaintiffs. Although, as we have noted (at [114] and [115]), the existence of a legal duty is not necessary for the purposes of establishing contributory negligence, we are of the view that the plaintiffs were not guilty of not taking the requisite care. Indeed, as we have alluded to in the preceding paragraph, a reasonable person in the shoes of the plaintiffs would have assumed that Cameron would fulfil its contractual obligations without any further action on their (the plaintiffs') part.

Conclusion

135 As we have already mentioned, the Judge dealt with the issues in the court below in a comprehensive and fair manner.

136 We differ somewhat in the reasoning with regard to two issues only. Of those two issues, we would modify the Judge's decision in part only with respect to one of them. In summary, in so far as the first issue is concerned, whilst we agree with the Judge that the documents in the Damages Bundle could not be admitted, we hold (in so far as the threshold issue with respect to the very introduction of the Documents is concerned) that this holding is based not so much on the fact (as the Judge found) that the plaintiffs had not demonstrated that they had satisfied a positive burden placed on them to comply with the requisite provisions of the Evidence Act *per se* but, rather, because the defendants had in fact objected to the introduction of the Documents. At *that* point, the plaintiffs were *then* under a legal obligation to in fact satisfy the requisite provisions of the Evidence Act, which they did *not*. In addition (and here we agree with the holding of the Judge), *in any event*, the plaintiffs did *not* meet the legal hurdles posed by the doctrine of hearsay.

137 In so far as the second issue is concerned, we agree with the Judge that both Cameron and Stork were *equally* liable to *the plaintiffs*. Where we differ, with respect, from her decision is the fact that insufficient consideration was given (in so far as the issue of an *indemnity* was concerned) to *the legal relationship between Cameron and Stork*. In the event, we hold that Stork was liable to indemnify Cameron in the sum of US\$250,000 for breach of its contractual obligations which it owed to Cameron (in addition to its liability to pay the plaintiffs US\$500,000 for the breach of the duty of care which it owed to them).

1 3 8 Returning to the dearth of argument in the court below, unfortunately, in an adversarial system, much depends upon the efforts of counsel concerned. Nevertheless, we ought, in fairness, point out that this last-mentioned issue has not been actively canvassed in the case law as well as textbooks and is, to that extent, a subtle one. However, we trust that it will be neither subtle nor esoteric after the clarification in the present case.

139 In the circumstances, we allow Cameron's appeal with regard to the issue of the indemnity claimed under its contract with Stork in part. In other words, in so far as the BOP stack is concerned, Stork is liable to indemnify Cameron in the sum of US\$250,000. In addition, Stork remains liable in the sum of US\$500,000, which represents its own liability to the plaintiffs with respect to this particular item and, to that extent, must contribute to any damages payable by Cameron to the plaintiffs to that extent. In all other respects, however, we affirm the decision of the Judge.

140 In so far as the issue of costs is concerned, we find nothing wrong with the decision of the

Judge (as set out in the costs judgment). However, in the light of our specific finding on the issue of indemnity as set out in the preceding paragraph, we would modify the Judge's order as to costs inasmuch as Cameron should be awarded half of its costs of the third party proceedings. In addition, Stork should indemnify Cameron to the extent of 25% of the costs (including disbursements) payable to the plaintiffs.

141 In so far as the present proceedings are concerned, the plaintiffs are to pay the costs of the defendants in Civil Appeals Nos 96 and 122 of 2005. The first defendant (Cameron) is to bear 25% of the costs of the plaintiffs and the second defendant (Stork) is to bear 75% of the costs of the plaintiffs in Civil Appeals Nos 97, 98, 128 and 129 of 2005. As between themselves, the first and second defendants are to bear their own costs in Civil Appeals Nos 97, 98, 128 and 129 of 2005.

[\[note: 1\]](#) See Item 1, Quotation No QT2279-GA.R1 at Cameron's Appellant's Core Bundle ("CACB") at p 147.

[\[note: 2\]](#) See CACB at p 147.

[\[note: 3\]](#) See the Appellants' Case ("AC") at [152].

[\[note: 4\]](#) See AC at [179].

[\[note: 5\]](#) See AC at [86].

[\[note: 6\]](#) See the Appellants' Core Bundle ("ACB") at pp 473-478.

[\[note: 7\]](#) See ACB at p 477.

[\[note: 8\]](#) See ACB at p 478.

[\[note: 9\]](#) See NE at pp 88-90.

[\[note: 10\]](#) See NE at pp 38-41.

[\[note: 11\]](#) See NE at pp 77-80.

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